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LEADING ARTICLES

JURISDICTION OF THE CIRCUIT COURT . . *George H. Ethridge* 195

LAW AND THE SYLLOGISM . . . . . *Victor W. Gilbert* 212

GROSS INCOME TAX AND GENERAL SALES TAX AS A SUBSTITUTE FOR STATE *Ad Valorem* TAXES . . *D. H. Waits* 217

JUDICIAL ADMINISTRATION IN MISSISSIPPI (II) . . *P. S. Sikes* 233

MISSISSIPPI—STORM CENTER OF SECESSION (III) *Percy Lee Rainwater* 255

COMPLETE TABLE OF CONTENTS OF THIS ISSUE ON PAGE iii

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CONTENTS

LEADING ARTICLES PAGE

Jurisdiction of the Circuit Court ..... *George H. Ethridge* 195

Law and the Syllogism ..... *Victor W. Gilbert* 212

Gross Income Tax and General Sales Tax as a Substitute for State *Ad Valorem* Taxes *D. H. Waits* 217

Judicial Administration in Mississippi (II) .... *P. S. Sikes* 233

Mississippi—Storm Center of Secession (III) ..... *Percy Lee Rainwater* 255

NOTE AND COMMENT

Creditors' Bills to Set Aside Fraudulent Conveyances in Mississippi 279

RECENT IMPORTANT DECISIONS

Agency—Independent Contractor—The Relationship as Distinguished from that of Master and Servant 294

Alimony—Effect of Remarriage of Wife—Power of Court to Modify Accrued Alimony 297

Equity—Relief Against Penalty—Distinction Between Penalty and Liquidated Damages 300

Process—Waiver of Service by Indorsement on Declaration During Term Time 303

Torts—Negligence—Liability of Railroad, Having Assumed Care of Injured Trespasser, for Failure Properly to Care for Him 306

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MISSISSIPPI LAW JOURNAL

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JURISDICTION OF THE CIRCUIT COURT

GEORGE H. ETHRIDGE*

The circuit court is preëminently the peoples' court, as it has more to do with liberties, social and political rights, as well as property rights, than any other court. It deals with all kinds of rights and especially with the public peace and order secured and enforced through the criminal law. It has, as a part of its machinery, the jury system, by which the common people participate in the administration of law and justice, and secures the people, in some measure, common-sense justice rather than technical justice. It is one of the greatest educational institutions in the country, and brings to the people a personal knowledge of their legal institutions and the laws of the land. It will be impossible, in the space of a magazine article, to discuss this subject in great detail, and when a statute is cited, the annotations thereto should be read and the changes in the statutes noted.

I hope to attract the attention of the Bar and law students to this great branch of our legal system, and procure a detailed study by them of the system and its great excellence. Public and private justice is largely administered through judicial tribunals known as courts. The powers of the judicial department are divided among different courts, none of which have full and complete jurisdiction of all subjects. The courts are divided into courts of original and appellate jurisdiction.

"Jurisdiction is a power constitutionally conferred upon a judge or magistrate to take cognizance of, and determine causes according to law."[1] The term is further defined by Black as "The power and

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[1]BLACK'S LAW DICTIONARY, citing *United States* v. *Arrendo,* 6 Pet. 691, 8 L. ed. 577; *Yates* v. *Lansing,* 9 Johns. (N. Y.) 413, 6 Am. Dec. 290; *Johnson* v. *Jones,* 2 Neb. 135.

authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of law, or to award the remedies provided by law, upon a state of facts proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of, or against, persons (or a *res*), who present themselves, or who are brought before the court in some manner sanctioned by law as proper and sufficient."[2]

By section 144 of the Constitution of 1890, it is provided that, "The judicial power of the state shall be vested in the Supreme Court and such other courts as are provided for in this Constitution." By section 146 of the Constitution it is provided that, "The Supreme Court have such jurisdiction as properly belongs to a court of appeals." Therefore, that court has only appellate jurisdiction.[3] Section 156 of the Constitution provides that, "The circuit court shall have original jurisdiction in all matters, civil and criminal, in this state, not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law." This court is, therefore, the repository of all jurisdiction of an original nature that is not vested *by this Constitution* in some other court. To determine just what original jurisdiction is vested in the circuit court, we must examine other sections for the jurisdiction of other courts. Other courts have a specified jurisdiction, while the circuit court has all not so specifically given other courts.

The Legislature may, under section 172 of the Constitution, confer additional jurisdiction on all courts created by the Constitution except the Supreme Court; but it cannot deprive a constitutional court of the jurisdiction given it by the Constitution. The appellate jurisdiction which may be conferred upon the circuit court is not specified, and it is left to the Legislature to define and grant such appellate jurisdiction. The Legislature has conferred a great deal of appellate jurisdiction on the circuit court. The Legislature is directed, by section 152 of the Constitution, to divide the state into circuit and chancery districts, and this has been done, from time to time.

By section 158 of the Constitution, a circuit court shall be held

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[2]Citing *Neno* v. *R. R. Co.*, 105 Mo. App. 540, 80 S. W. 24; *Ingram* v. *Fuson*, 118 Ky. 882, 82 S. W. 605; *Tod* v. *Cusman*, 123 Iowa, 693, 99 N. W. 686; *Reynolds* v. *Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. ed. 464. See also WORDS AND PHRASES (all series), BOUVIER'S LAW DICTIONARY, title, "Jurisdiction," where more definitions are found.

[3]*Planters' Ins. Co.* v. *Cramer*, 47 Miss. 200; *Brown* v. *Caraway*, 47 Miss. 668; *Pierce* v. *Halsell*, 90 Miss. 171, 43 So. 83; *Yazoo & M. V. R. Co.* v. *Wallace*, 90 Miss. 609, 43 So. 469, 122 Am. St. Rep. 321.

in each county at least twice a year, and the judges of said courts may interchange circuits with each other, as may be provided by law. The purpose of this requirement is to have justice speedily administered, the violations of law inquired into, and criminals tried and punished. By section 264 of the Constitution, grand and petit (or trial) juries are provided for, requiring them to be qualified electors. In the case of *Ex parte Caples,*[4] the Supreme Court criticized the practice of pretermitting courts, stating that it was the purpose of this section to require at least two courts to be held in each county each year, and that matters of mere inconvenience or expense did not constitute sufficient reason to pretermit a court. The public peace and order are so important that frequent inquiries by grand juries should be held in order that the peaceful and law-abiding may receive the protection of the law, and that the lawless may be restrained and punished. It is also important that civil litigation be disposed of with reasonable dispatch. In many counties the Legislature has provided for more than two terms of court for the circuit court.

The jurisdiction of the circuit court is limited to the county, but in some cases, notably along the Mississippi River, agreements or treaties have been made giving courts jurisdiction over the entire stream. In such cases, the limits of the county are extended for certain purposes to the shore line of the opposite state, and the limits of that state, for certain purposes, are extended to the Mississippi shore. Where the courts of one state take, in such cases, jurisdiction of a particular case, the other state cannot deal with that case and a conviction or acquittal in such case in one state is a bar to trial and conviction in the other state. Such treaties exist between Mississippi and Arkansas and have the approval of Congress.

The jurisdiction of the chancery court is conferred by sections 159, 160, 161, and 162 of the Constitution.

As the constitutional jurisdiction of the circuit court is dependent upon what jurisdiction is taken by other constitutional courts, it is necessary for the student and practitioner to determine these matters, and hence, I call attention to them. Of course, it is within the power of the Legislature to confer statutory jurisdiction in addition to constitutional jurisdiction, and, in many cases, it has done so; but this does not in any matter abridge the constitutional jurisdiction of the circuit court. The constitutional convention set up courts that the Legislature cannot destroy, for the reason that there should be, always,

[4]58 Miss 358.

a court competent to try lawsuits and render justice to each litigant, regardless of the whims and caprice of the Legislature.

Section 24 of the Constitution requires that the courts shall always be open for the reception of suits to vindicate rights and redress wrongs, provided that every person, for wrongs done him, shall have remedy, by due course of law, and that justice shall be administered without sale, denial, or delay. Were it not for constitutional provisions, the legislature might prevent certain persons from securing justice and might deny remedy for legal wrongs. The courts created by the Constitution have jurisdiction of all matters falling within the judicial province. The Legislature may and has provided many inferior courts, but these do not withdraw the jurisdiction conferred by the Constitution.

Section 170 of the Constitution gives the Boards of Supervisors jurisdiction over roads, ferries, and bridges, and provides that they shall perform such other duties as may be provided by law. In *Ex parte Fritz*,[5] the Supreme Court held that section 170 of the Constitution authorized the Legislature to confer legislative and executive duties, as well as judicial duties, upon boards of supervisors. Appeals lie from the board to the circuit court from its judicial action, but not otherwise.[6]

Section 171 of the Constitution confers jurisdiction upon justices of the peace, in all civil matters where the principal amount in controversy shall not exceed two hundred dollars, and concurrent jurisdiction with the circuit court over all crimes whereof the punishment shall not extend beyond imprisonment in the county jail; and provides that the legislature may confer upon justices of the peace exclusive jurisdiction over petty misdemeanors if it sees proper. It will be seen that the circuit court has full jurisdiction over all crimes and misdemeanors, for the Legislature has never given the justices of the peace exclusive jurisdiction over any petty misdemeanors.

I desire to call attention to the difference in language in section 156 of the present Constitution, conferring jurisdiction on the circuit court, and the language of the Constitution of 1869.

By section 14 of Article 6 of the Constitution of 1869, the circuit court was given jurisdiction in the following language:

"Circuit courts shall have original jurisdiction in all matters, civil and criminal, within the state, but in civil causes only where the principal amount in controversy exceeds $150.00."

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[5]86 Miss. 210, 38 So. 72.

[6]*De Soto County* v. *Pigeon-Thomas Iron Co.*, 114 Miss. 274, 75 So. 117; *Illinois Central R. Co.* v. *Dodds*, 104 Miss. 643, 61 So. 595.

By section 16 of Article 6 of the Constitution of 1869, the chancery court was given jurisdiction in the following language:

"Chancery courts shall be established in each county of the state, with full jurisdiction in all matters of equity, and of divorce and alimony, in matters testamentary and of administration; in minors' business and allotment of dower, and in cases of idiocy, lunacy, and persons *non compos mentis*." Under the peculiar language of the Constitution of 1869, the words "civil causes" used in section 14, were necessarily used in a restricted sense, and do not embrace the matters conferred upon the chancery court by section 16.

Construing the Constitution of 1869, in my opinion it was held in *Bell* v. *West Point*,[7] that the term "civil" in this section is used in contradistinction to "criminal," and includes all grounds of jurisdiction of litigable matters not specifically given in some other court. The Legislature manifestly put this interpretation upon the present Constitution, for by the statute on general jurisdiction, section 490 of the Code of 1930, it is provided that:

> "The circuit court shall have original jurisdiction in all matters when the principal of the amount in controversy exceeds $200.00, and of all other actions and causes, matters, and things arising under the Constitution and laws of this state, *which are not exclusively* cognizable in some other court, and such appellate jurisdiction as prescribed by law; and such court shall have power to hear and determine all prosecutions in the name of the state for treason, felonies, crimes, and misdemeanors, except such as may be exclusively cognizable before some other court, and said court shall have all the powers belonging to a court of oyer and terminer and general jail delivery, and may do and perform all other acts properly pertaining to a circuit court of law."[8]

It was held in *Montross* v. *Statem*,[9] that where jurisdiction is given to the court by the Constitution, it cannot be conferred exclusively on any other court by the Legislature; but the Legislature may confer upon another court concurrent jurisdiction by virtue of section 172 of the Constitution. However, when the Legislature creates a court which has not been created by the Constitution, it cannot confer exclusive jurisdiction on such court as to any matters, because the Constitution vests the whole judicial power in the court provided for by itself.[10] Acting under section 172, the Legislature has created

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[7]51 Miss. 262.

[8]Italics are the present writer's. See also *Parsons* v. *Bedford et al.*, 3 Pet. 433 7 L. ed. 733.

[9]61 Miss. 429.

[10]See also *Yazoo & M. V. R. Co.* v. *Wallace*, 90 Miss. 609, 43 So. 469.

many courts of special, limited, or statutory jurisdiction. Courts so created have only such jurisdiction as the Legislature has conferred upon them, and no other, but some other court than the special statutory court, or inferior court has concurrent jurisdiction with such court.

By section 491 of the Code of 1930, the circuit court is given jurisdiction of all cases transferred to it by the chancery court or remanded to it by the Supreme Court. The section is a statutory enactment to carry out the provisions of section 162 of the Constitution which states that the chancery court shall transfer to the circuit court any cause that may be erroneously brought in the chancery court, over which the circuit court has exclusive jurisdiction. It was the intention of the Constitution framers and of the Legislature to guard the litigants against mistakes as to jurisdiction on their part, or on the part of attorneys representing them, where a cause of doubtful jurisdiction was brought in the wrong court.

Formerly the court which was without jurisdiction was compelled to dismiss such causes, and had no power to transfer them to the proper courts. To guard against delay, and the injustice of having to proceed all over again because, through error of judgment, some court of original jurisdiction might entertain jurisdiction of a cause not conferred upon it by law, section 147 of the Constitution was enacted. This section prohibits the Supreme Court from reversing a cause solely on the ground of error in the trial court as to whether the cause was one of equity or of common-law jurisdiction. When parties are now brought into court, they may be transferred to the proper court in case an error has been made. But the cause is not dismissed; the rights of the parties are preserved, and appearance is retained in the court to which the cause has been transferred.

It is to be noted that some decisions have been made since section 156 has been a part of the Constitution, without a careful analysis of it, and without discussion. In the case of *Vinegar Bend Lbr. Co.* v. *Oak Grove and Georgetown R. Co.*,[11] in which it was held that, upon an appeal to the circuit court from the judgment of a special eminent domain proceeding although the cause was tried *de novo*, the circuit court was without power to determine whether the parties seeking to condemn by eminent domain had the power conferred upon them by law so to do. It was also held that it is competent for the Legislature to create a special tribunal for the enforcement of the right of eminent domain, although it was not given jurisdiction to determine

[11]89 Miss. 84, 43 So. 292.

the right of the plaintiff to condemn the land. Section 17 of the Constitution declares that the question whether the contemplated use for which it is proposed to condemn private property as a public use shall be a judicial question, and, as such, determined, without regard to legislative assertion that the use is a public use. It was held in that case that the remedy of the property owner was by injunction in equity. The decision just referred to construes sections 1884 and 1885 of the Code of 1906.

Under section 156 of the Constitution, it seems that the circuit court had original jurisdiction of eminent domain proceedings wherever and whenever the Legislature conferred that power upon any court. However, a proper case for testing the circuit court jurisdiction and challenging the constitutional power of the Legislature, to deprive the circuit court of its jurisdiction conferred by the Constitution, was not originally brought in the circuit court. In order to raise the question properly and directly, it was necessary to have a suit brought in the circuit court presenting the question for decision.

In *Sullivan* v. *R. Company*,[12] it was held that in presiding over a court of eminent domain, a justice of the peace acts ministerially rather than judicially, and may be controlled by mandamus. It is too clear for discussion, it seems to me, that a proceeding in eminent domain is a judicial proceeding. The body created to exercise the power of eminent domain must exercise judicial powers. The distinction between the justice, when it comes to instructing the jury and ruling on the evidence offered before the jury, does not seem to have been given consideration or due prominence. Necessarily, the justice has some functions to perform, and these functions are judicial. He must rule on the competency and relevancy of the evidence, because it is not contemplated that the parties proceed and admit all kinds of evidence in such cases.

The question has been remedied by section 1510 of the Code of 1930, which provides that a writ of prohibition is the legal remedy for testing the question whether the application seeking to exercise the right of eminent domain is in character such a corporation, association, or legal entity as is entitled to the right, and whether there is a public necessity for the taking of the particular property, or a part thereof, which it is proposed to condemn; and it also provides that all the provisions of the chapter on quo warranto shall apply to the procedure under this section.

I make these observations because it appears to me that the atten-

[12]85 Miss. 649, 38 So. 33.

tion of the Bench, Bar, and Legislature should be directed to the change of language in the Constitution of 1890, necessitating a different construction from what had theretofore been placed upon the jurisdiction of the circuit court.

By section 493 of the Code of 1930, the circuit court is given statutory power, by motion, to require the officers and attorneys at law to pay over money collected or property received and not paid over on demand, and to render judgment and execution thereon.

By section 494 of the Code, it is provided that if suit shall be brought in a circuit court for a sum less than that of which the court can take cognizance, or if a greater sum than was due shall be demanded on purpose to confer jurisdiction, the plaintiff shall be nonsuited.

The circuit court has all jurisdiction which was possessed by the common law courts of England, including the courts of the King's Bench, in addition to other jurisdictions. Under former constitutions, the circuit court was limited to this common-law jurisdiction unless a statute conferred extra jurisdiction upon it. It became important, therefore, to know what character of actions belong in the circuit court.

The difference, under the English system, prior to the Revolution, between the circuit and the chancery courts was principally as to methods of rendering justice. In the common law courts, the court only awarded a sum of money as compensation either by way of damage, or on contract, and left the plaintiff to secure an equivalent of its damage or loss by judgment and execution.

The courts of equity, on the contrary, operated upon the person directly. Equity courts had the power, within their jurisdiction, to direct the parties to the suit to do or perform certain acts, or to refrain from doing or performing certain acts, and could enforce their judgment by a contempt proceeding. In all matters of contracts and torts, the common law courts had jurisdiction unless the matters involved were so complicated and difficult that a jury could not decide the issues involved readily. These actions include covenant, debt, assumpsit, trespass, trover, detinue, replevin, trespass on the case, ejectment, forcible entry and detainer, mandamus, prohibition, and quo warranto.

This article will be, by limitation, too brief to discuss in detail, what constitutes a cause of action under each heading, and the student or practitioner must refer to text books and case law upon the subject.

Wherever a statutory right of action is given, usually there is an appropriate action to enforce the right given by the statute. But the form of action in this state is not now important. It is a matter of substance now, and not of technical form.

Section 11 of the Code, for instance, gives a right of action against a party using language toward another considered as insulting and leading to a breach of the peace, or calculated to do so; and the jury is made the sole judge of the damage sustained. This is purely a statutory right of action, and the circuit court has jurisdiction of it. It is different from libel and slander, which is a common law action, in that in libel and slander the language must have been used or published to a third person, and must have imputed crime or moral delinquency to the person of whom spoken. Under section 11 above mentioned, the words are addressed directly to a person, or in his hearing and presence. The purposes of section 11 were largely to afford a civil remedy to redress or prevent insults, with the purpose of minimizing personal violence, and especially duels, which were formerly very common in such cases.

Criminal Jurisdiction

The circuit court also has jurisdiction of all matters of crimes and misdemeanors under the section of the Code above mentioned, and under section 156 of the Constitution. This original jurisdiction of the subject matter is conferred by Constitution and statute, but before the circuit court gains actual cognizance of the crime, there must be an indictment found by a grand jury, which is an inquisitorial body provided by the Constitution and by statute for inquiring into violations of the criminal law, and is a part of the circuit court although largely independent of the circuit judge. It deliberates in secret, and is the sole judge of whether or not an indictment should be returned in any particular case.

The indictment at common law was very technical and precise, but it has been modified by many statutes. Indictments by grand juries must be concurred in by twelve jurors, under section 1197 of the Code. When the indictment is found by the grand jury it must be presented in open court by at least twelve jurors, and must be marked "filed" by the clerk, under section 1198 of the Code. When the indictment is so filed, a warrant for the arrest of the person indicted is issued and the arrest of the person on the indictment, duly found, gives the circuit court jurisdiction of the offense and of the offender. Section 1202 of the Code.

Formalities and useless averments, not necessary to define the crime, are dispensed with by section 1204 of the Code. Under this section, all dilatory pleas to an indictment must be sworn to. Indictment may be amended in certain cases after a dilatory plea is disposed of, section 1205 of the Code. All defects appearing on the face of an indictment must be taken by a demurrer, and not otherwise. Under section 1206, Code of 1930, it is the duty of the party indicted, if the indictment, on its face, appears to be insufficient or illegal, to demur to it, and have it called to the attention of the court. Many of the defects can be cured by amendment, and where such is the case, if the demurrer is not filed, the indictment will support a conviction.

Any matters not appearing on the face of the indictment which may render it illegal must be raised by a motion to quash, under section 1207 of the Code, filed in the court, setting forth the particular facts relied on to render the indictment illegal. There are, of course, many such matters. It sometimes happens that private prosecutors get before the grand jury and urge a prosecution against a particular person, using improper methods to influence the grand jury, which is supposed to be absolutely independent in its deliberations, uninfluenced by anything except the law, the evidence, and the public good.

By section 1308, an indictment for any offense shall not be insufficient because of an omission to state the time at which the offense was committed in any case where time is not of the essence of the offense. Many provisions with reference to an indictment are contained in sections 1209-1217, inclusive, of the Code of 1930. Process for the arrest of a defendant if a natural person, is provided for in section 1218, and for corporations in section 1219. After a person is arrested, he is entitled to bail, if the offense be not capital, but must be brought in before the court, especially in cases of felony, for the fixing of the amount of the bail, and the character of surety required. Provisions with reference to bail are contained in section 1241-8 of the Code.

When a person is arraigned in a circuit court, the indictment is read to him and he is required to plead either guilty or not guilty; and if he pleads guilty, the court may pronounce sentence upon him then, or defer doing so until a later date in the term. If he pleads not guilty, the case goes to trial before a jury. If he refuses to plead when arraigned, by section 1261 of the Code, the court is required to enter plea of not guilty for him. If the defendant or the State is not ready for trial when the case is called by the judge for

trial, a motion or application for a continuance must be filed, and evidence introduced thereon to sustain the motion or application, if it is not confessed by the prosecuting attorney.

In a capital case, an application for a continuance must be made before the drawing of a special venire as to all matters existing at that time, but for causes arising afterward, the continuance may also be allowed, if proper.

By section 1297 of the Code it is specified that on application for a continuance it shall be lawful for the State or the defendant to make any admission of any fact sought to be proved by the other party by any absent witness, and such admission shall have the effect as if the absent witness or other evidence were present in court and no more. But if compulsory process will probably obtain the attendance of the absent witness, and the defendant has not had the opportunity of obtaining such process, the cause shall be continued unless the defendant desires a trial. In the case of *Lamar* v. *State*,[13] it was held that the application should set forth with clearness what the absent witness would testify to, which testimony must be material, and if the application is overruled, the affidavit of the said witness, setting forth the evidence, should be produced on motion for a new trial; and that the defendant should continue to use the process of the court, and if the witness can be produced, he must be produced on motion for a trial.[14]

In capital cases, a copy of the indictment and a list of the venire men must be served upon the defendant one entire day before the trial if he make motion in writing therefor, under section 1262 of the Code. An indictment for a common-law offense is good, if made according to the common-law form under sections 1312-3 of the Code, and offenses at common law, where not otherwise provided for by statute, are misdemeanors and are punishable by a fine of not exceeding $500.00 and imprisonment in the jail of not more than six months, or either. Section 1314 of the Code.

By section 1316 of the Code, no conviction shall be had except by plea of guilty, or by a verdict on indictment by a jury. The various statutes defining crime prescribe the punishment that shall be inflicted. These are too numerous and voluminous to be set forth in an article of this kind.

Whenever, if by reason of prejudice or pre-judgment, or a grudge or ill-will against the defendant, in the public mind, he cannot have

[13]63 Miss. 265.
[14]Accord: *Ware* v. *State*, 133 Miss. 837, 98 So. 229, and others.

a fair trial in the county where the crime is claimed to have been committed, a change of venue may be granted upon application of defendant to a convenient county, upon such terms as may be proper, to be determined by the trial judge, under section 1265 of the Code.

Where two or more persons are indicted in one indictment, each is entitled (in felony cases) to a severance and separate trial on motion therefor, under section 1271 of the Code.

In misdemeanors, it is discretionary with the trial court whether a severance shall be granted, but it should be granted if the rights of either would be prejudiced by a joint trial. Where there is a joint trial, either for misdemeanor or for felony, all of the defendants should be tried at the term at which the indictments are returned (known as the return-term)—unless showing be made as to why it should not be so heard, under section 1285 of the Code.

The accused may be tried in his absence in misdemeanor cases, provided the absence is caused by the defendant. He has a right to be present unless he has, by some misconduct, waived that right. But it is his duty to be present when the case is called.

In felony cases, even in capital cases, if the accused be on bond, and fails to be present, or waives his presence, he may be tried, under section 1276.[15]

In capital cases, the accused and the state each have twelve peremptory challenges, and as many more as they can show cause for, under section 1277. In criminal cases, not capital, the state and the accused each are allowed six peremptory challenges, but the state must exercise its right of challenge first, and present the defendant a full panel accepted by the state, before the defendant is required to exercise his peremptory challenges.

In certain cases, more than one offense may be proved, but where more than one offense is proved, and there is an acquittal or conviction, a defendant cannot be tried on any other offense committed anterior to the finding of the indictment upon which he is tried. See sections 1286-7 of the Code. A change made in the law after commission of an offense, or the finding of an indictment, and before trial, does not affect the punishment to be inflicted under the prior law, under section 1361 of the Code.

Appellate Jurisdiction

As seen by section 156 of the Constitution, the circuit court shall have such appellate jurisdiction as may be prescribed by law. Appeals

[15]See *Thomas* v. *State,* 117 Miss. 732, 78 So. 147.

have been granted to the circuit court from inferior judicial tribunals in a great variety of cases. Sometimes the appeal is on the record by bill of exceptions, and in other cases, the cause of appeal is tried *de novo,* in the same manner as if it had originally been brought in the circuit court. Where the appeal is on bill of exceptions it must show the facts, in substance, involved in the suit, including the statement of cause of action and the defenses thereto, with all the facts introduced in evidence, of course, in very abridged form. It should also show the rulings of the trial court or tribunal on issues of law, such as admitting or rejecting evidence, or the rulings on legal points.

By section 61 of the Code of 1930, the right of appeal is granted to the circuit court from boards of supervisors or municipal authorities, and this appeal is on bill of exceptions.

By section 62 of the Code of 1930, the right of appeal is granted from the assessment of taxes by supervisors or municipal authorities to the circuit court. This appeal must be taken within ten days after the adjournment of the meeting at which such decision is made, and bond must be given as therein provided. It is there tried anew as a preference case at the first term, and if decided against the person appealing, judgment shall be rendered on the appeal bond for damages and costs. If the matter is decided in favor of the person who appealed, judgment in his favor shall be certified to the board of supervisors or the municipal authorities, as the case may be, which shall pay the costs.

By section 63, Code of 1930, an appeal is allowed from a justice of the peace in civil cases, and bond must be filed within ten days after the rendition of the judgment, in double the amount of the judgment or of the property involved, which bond must be approved by the justice of the peace which tried the case. On reaching the circuit court, on appeal from the justice court, the case is tried anew in a summary way, without pleadings in writing, at the first term, unless cause be shown for a continuance.

In section 68 of the Code, in all cases of conviction for a criminal offense against the law of the state by judgment of a justice of the peace, mayor, or police justice of a city, town, or village, for the violation of an ordinance, an appeal may be taken to the circuit court, which may stay the judgment appealed from. Bond for appeal must be given as prescribed in the statute. In the circuit court, the case is tried anew and if there is default of the defendant, forfeiture is taken against him and his sureties. The affidavit charging the offense, or the proceedings in the cause, may be amended at any time

before a verdict, so as to bring the merits of the case fairly to trial on the charge intended to be embraced in the affidavit. Where the appellant fails to appear and forfeiture is taken on his bond, warrant may be issued for his arrest, and he may be brought before the court to be tried on the merits.

Under section 69, Code of 1930, any person who has been convicted of a criminal offense against the law of the state or municipality may appeal on affadavit that on account of his poverty he cannot give bond; but this shall not operate as a supersedeas of the judgment, nor discharge the appellant from custody, but the judgment shall be executed as if the appeal had not been taken, and this shall not affect the trial of the case anew in the circuit court.

Under section 72 of the Code of 1930, a writ of certiorari may be issued at any time within six months after conviction, on good cause, supported by affidavit, which shall operate as a supersedeas, the party giving bond with security to be approved by the judge or clerk of the circuit court. In case of an affirmance of the judgment of the justice of the peace, the same judgment shall be given as on appeals. In case of a reversal, the circuit court shall enter such judgment as the justice court should have rendered.

By section 73 of the Code of 1930, certiorari to all other inferior judicial tribunals may be issued as provided in section 72, and this is true although no appeal may be provided from the judgment by statute. The circuit court has jurisdiction independent of the statute to issue a certiorari.[16]

By Chapter 17, Code of 1930, county courts were created in certain counties having a certain population, and this court has jurisdiction by statute of all misdemeanors, concurrent with the circuit court and justice-of-the-peace courts, and of civil suits in amounts not exceeding $1,000.00. Appeals from county courts to the circuit courts are provided for in section 704 of the Code, and no appeal can be taken from an interlocutory order of the county court unless the cause be delayed unreasonably in the county court. The appeal is decided on the record from the county court, and if no prejudicial error be found, the matter is affirmed and judgment entered in the same manner and against like parties, and with like penalties, as provided in affirmances in the Supreme Court. The appellant must assign errors in the circuit court relied upon for a reversal of the judgment. If prejudicial error be found, the circuit court shall reverse and the

[16]*Holberg* v. *Mason,* 55 Miss. 112.

cause shall be transfered to the docket of the circuit court for a trial anew on the merits.

Many of the provisions in the appeals to the circuit court, which provide for a trial *de novo* on the merits are given so that the party may have the benefit of trial by jury provided for by section 31 of the Constitution. Where a jury is allowed in the inferior court, it is usually a jury of six men, whereas the Constitutional jury requires twelve men.

By section 91 of the Code of 1930, an appeal may be taken from arbitration proceedings, and by section 92 the ground upon which arbitration proceedings may be set aside, are set forth. The chapter on arbitration and award is intended to provide a method of settling disputes and disagreements without resorting directly to judicial proceedings. Parties cannot be compelled to arbitrate, but when they do agree to arbitrate, their agreement binds them, unless one of the grounds for appeal, provided for in section 92-96, exists.

Appeals from peace bond proceedings are provided for by section 1339, Code of 1930, in that any person aggrieved by a requirement to give security to keep the peace, may at any time while requirement is in force, appeal to the circuit court on his application to the justice of the peace, and upon his giving the required peace bond with the further condition therein that the appellant shall pay all costs, in case it shall be adjudged against him in the circuit court; and thereupon, all the papers in the case shall be returned by the justice of the peace to the officer, clerk of the circuit court, which court shall examine the case anew, and either approve the bond given by appellant, discharge him therefrom, or require him to enter a new bond to keep the peace, in such sum and for such time, not exceeding twelve months, as the court may prescribe, which judgment shall be enforced by committing the party to jail as in other cases of failure to give bail, from which he shall be delivered only by giving the required bail and paying costs and jail fees. Such appeal, however, shall not supersede the judgment requiring a bond to keep the peace until such judgment shall be reversed in the circuit court. Peace bond proceedings are designed to prevent breach of the peach and threatened injury of one person by another, and are not strictly criminal proceedings.

Section 6196, Code of 1930, allows an appeal from the registrar to the board-of-election commissioners. Section 6197 allows an appeal from the order registering a voter by any elector in the county; and section 6200 allows an appeal from the board-of-election commissioners by a bill of exceptions, embodying the facts, within two days after

the rendition of the decision, to the circuit court, by giving bond as prescribed in the sum of one hundred dollars, payable to the State, conditioned to pay all costs in case the appeal shall not be successfully prosecuted. When appeal is so taken, the commissioners are under duty to return the bill of exceptions and bond to the circuit court, after five days of the filing of the same with them, and the circuit court shall have jurisdiction to hear and determine such appeal.

Section 6202, Code of 1930, provides that should the judgment of the court be in favor of the right of an elector to be registered, the court shall so order and shall direct the registrar of the county to register him forthwith. Costs, in any case shall not be awarded against the commissioners or the registrar.

Section 248 of the Constitution provides that "Suitable remedies by appeal or otherwise shall be provided by law, to correct illegal or improper registration, and to secure the elective franchise to those who may be illegally or improperly denied the same." The statute referred to carries out the constitutional mandate.

By sections 6258-60, provision is made for the contest of elections. The circuit court has jurisdiction of these contests in the case of county officers or state district officers. It is provided that any person desiring to contest the election of another person as elected to any office in a county, may, within twenty days after the election, file a petition in the circuit court of the county, setting forth the ground upon which the election is contested; and the clerk shall thereupon file and issue a summons as in other cases, and the court shall, at its first term, cause an issue to be made up and tried by a jury, and the verdict of the jury shall find the person having the greatest number of legal votes to be elected. If the jury shall find against the person returned elected, the clerk shall issue a certificate thereof; and the person in whose favor the jury shall find shall be commissioned by the governor, and shall qualify and enter upon the duties of his office. Each party is allowed ten peremptory challenges, and new trials shall be granted and costs awarded as in other cases. And in case the election of district attorney or other state or district election be contested, the petition may be filed in any county of the district, or in any county of an adjoining district, within twenty days after the election, and like proceedings shall be had thereon as in the case of county officers, and the person found to be entitled to the office shall qualify under the law, and enter his duties.

It is provided in section 6259 that if the petition shall be filed more than forty days before the term of the circuit court next after

the election which is contested, the summons may be made returnable, and a trial of the issue be had in vacation in the manner prescribed for trial in vacation of an information in the nature of a quo warranto; and all of the provisions in reference to a trial in vacation of such proceedings shall apply to the trial of issues as to contested elections in the state or county as herein mentioned. But this section shall not be held to include a contest of the election of a justice of the peace, constable, coroner, surveyor, or member of the board of supervisors. An appeal lies from the judgment rendered in vacation.

An appeal is allowed under the chapter on landlord and tenant, sections 2236-7. Under this chapter, a distress warrant may be issued under affidavit, with bond, for the seizure of agricultural products to satisfy the rent and supplies furnished by the landlord. Unless replevin is filed by the tenant, the officer may sell the property and pay the money to the landlord. If the tenant replevies the property this is the beginning of a suit, and the issue is tried under the chapter, and appeal lies from the decision of the magistrate under the proceedings instituted, who is required to keep a record of such proceedings; and the right of appeal from that judgment exists under section 2236.

Section 2237 provides for proceedings when a tenant deserts the premises, and provides for an appeal from the proceedings before the justice of the peace acting in such case. The appeal is to the circuit court, and must be taken within thirty days after possession delivered, by serving notice in writing upon the landlord, and by giving bond with sufficient sureties, to be approved by the justice for the payment of costs of appeal; and on giving such bond and serving such notice, the appeal is brought to the circuit court and at the return term of that court the appeal is considered, and judgment rendered.

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[17]*Perkins* v. *Carroway,* 59 Miss. 220.

LAW AND THE SYLLOGISM

VICTOR W. GILBERT*

"As an example of inconsistency, why would the court take judicial knowledge of promulgation of executive orders in Clark & Co. vs. Miller, 154 Miss. 233, 122 So. 475, and of the 'Attorney General's holdings' in Frisco vs. Busby, 163 M. 574, 143 So. 887, and 'of the confirmation by the Senate of the appointment by the Governor to an office' in Witherspoon vs. State, 138 M. 310, 103 So. 134, and yet hold that it 'cannot take judicial notice that a certain officer is a foreign corporation's statutory agent for service of process.' Masonite Corporation vs. Burnham, 146 So. 292, or that the insurance commissioner has been appointed for this purpose. Ins. Co. vs. Taylor, 107 M. 169, 65 So. 125.

"Again why will the court take judicial knowledge of the character and habits of domestic animals and of the fact that all foxes do not have *animum revertendi* and yet refuse to judicially know the effect of extracting turpentine from pine trees.

"Sometimes I am inclined to believe that in the syllogism by which the Court deduces the conclusion given us in the reports, there exists an inarticulate major premise (not mentioned in the opinion) which forms the real *ratio decidendi.*"[1]

Logic is an intellectual tool. The so-called progress of the race has not been behind the leadership of the intellect, but is the result of the propulsion of human emotions. In the language of the craftsmen of Sociology: "It is not the human mind which is consciously constructing the social process in evolution; it is the social process which is constructing the human mind in evolution." Society creates the intellect; not the intellect, society. Civilization survives or perishes as a people's emotions propel forward and upward or retrogressively towards primitive impulses and institutions.

It was not alone the impoverishment and erosion of the soil that destroyed the vast and imperial fabric of ancient Rome, but as well the decadence of the propulsive emotions of her people through weariness of spirit, satiation with grandeur and the intolerable burden of

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[1]Excerpts from a letter of Hon. O. B. Triplett, Jr., Forest, Mississippi, commenting on certain data on Judicial Notice. Mr. Triplett was kind enough to permit me to make the quotation. He raises vital questions which I am wholly incapable of answering, and Logic in this monograph is limited to the syllogism as an instrument for discovering an applicable rule of law.

taxation. Her laws were sound and their maxims still permeate the juristic thought of the world; her intellectual supremacy has not abdicated; but behind the banners of the legionaries was no longer the will to conquer; and when that spirit died the Praetorian Guards sold the empire to the highest bidder for cash.

The glory of Greece had passed when the syllogism was born.

The demos does not think; it feels. Thinking is the most individualistic thing in this world. Was it not supreme art in Roden to form his statue of the Thinker as a naked, lonely, solitary figure, with chin in fist and eyes fixed on the ground?

These emotions crystalize into the *mores* of a people; you can call it public opinion, current thought, German *zeitgeist* or what not, and no legislative fiat nor judicial decree is effective law that defies it. The despot may defy it and for the time his force impose it; but this is tyranny, not law. Laws must adapt themselves to the ever-changing needs of a people, however illogical the process.

Reveal to me the spirit of the sheriff's *posse comitatus* and you need not read me the statutes and decisions for *there* is inscribed the ultimate effective law. If this spirit find objective expression in statutes and decisions they are supreme. Law is a spirit but it is not encased in a logical formula.

Hence, Lord Coke's extravagant panegyric on the common law as the perfection of reason was a bald absurdity, for he assumed that laws were the product of human reason. This same fatal fallacy lurked in the philosophy of Jeremy Bentham, the greatest of juristic thinkers.

The field of tacit assumptions in judicial decisions awaits the exploration of some juristic genius. These tacit assumptions are implicit in every decision. Otherwise written opinions would be impossible unless each was a complete treatise on the law of the subject. "A page of history is worth a volume of logic," says Holmes. And in the background of all true decisions is the history that records the experiences, customs, habits, needs and wants of a people and their concepts of life and social institutions.

"The life of the law has not been logic; it has been experience," again says Holmes.

We need not reject wholly the maxim of the ancient Romans that "experience is the school of fools" nor the psychological postulate of Marcel Proust that men "do not profit by experience; we learn only that to a given stimulus we will react in a predictable way and this repeatedly," to find in experience the history that moulds in-

stitutions and laws. The predictable reactions of a race are the great sources of laws, and whether these laws are wise or foolish or illogical is no concern of the court; it must pronounce that which is established or settle that which is uncertain.

The primary function of a court is to settle controversies. It is commonplace that it is more important that the applicable rule of law be settled than that it be settled right. And when courts are confronted with controversies that must be settled and there is not in the statutes and decisions an established applicable rule, what determines and fixes the judgment of the Court? Whence do they seek the rule when they must thus legislate? We may stick our heads in the sand as foolishly as the ostrich and say they do not legislate, but they do. The answer may be found in history or experience embedded perhaps in analogy, and failing these, then in expediency and public policy.

Take the classic syllogism of Aristotle:

> "All men are mortal.
> Socrates was a man.
> Therefore, Socrates is mortal."

Perfect. It compels universal assent. Yet does not Socrates bid fair to be the world's one *im*mortal?

But what is in this major premise? "Man" and "mortality."

In this "man" what have we? All his emotions, his loves and hates; his passions and prejudices, whims and limitations; his desires, wants, necessities; his selfishness, greed, cupidity; his magnanimity, disinterestedness, benevolence; his sense of rights and wrongs; his family, faction, class, religion; his mendacity and his love of truth; his inconsistencies and passion for order; his lawless respect for law; his merciless injustice and his compassion wide as the world.

There is no common denominator of human experience.

It needed not the masterly decision of the Supreme Court to demonstrate that law and logic are not synonymous terms.[2]

Statutes are enacted and social pressure forces their repeal; decisions are handed down and changing needs of a people overrule them; and from generation to generation this trial and error are the milestones that measure the progress of the race, and fix the history and experience that warns and inspires the legislator and the courts in establishing the new rule when the necessity confronts them. Wise is that court and full of wisdom is that legislature which finds the

[2] *Railroad* v. *Scott,* 108 Miss. 871.

current of the stream of human consciousness and which can sense the driving force of a race that finds an outlet in its Bibles, its Korans and its Codes of Hammurabi.

Would you take a peep into the judicial workshop and see the pressure of necessity shaping laws? Then watch the courts as they deal with that impending flood of litigation over aviation. The most amazing prophecy in secular literature is in Tennyson's Locksley Hall:

> For I dipt into the future, far as human eye could see.
> Saw the Vision of the world, and all the wonder that would be;
> Saw the heavens fill with commerce, argosies of magic sails,
> Pilots of the purple twilight, dropping down with costly bales.

Over against the gorgeous imagery of this poetry place the prosaic maxim, that was old when Blackstone was christened, that he who owns the soil owns up to the sky, or literally up to the stars. Before the days of the aeroplane, legislatures and courts were content to let Farmer Jones feel that he owned everything up to the sky, but now when the heavens begin to fill with commerce, watch the courts hang, draw and quarter this old maxim and cut a few hundred million miles off Farmer Jones' territorial boundaries. They are already beginning to construe it and they are already very doubtful whether a correct translation of it would warrant giving such a high altitude to such a low piece of land. You will see that in the end Mr. Jones is going to be lucky if he doesn't have to take down his lightning rods for interfering with these "argosies of magic sails."

How near the earth can an aeroplane travel without trespassing on Mr. Jones' property? When legislation fixes the height, then what sovereignty shall have jurisdiction above that? Suppose that 1000 feet is fixed; who shall control the traffic above that? If murder is done ten thousand feet in the air, what court shall have jurisdiction? To whom does this space belong? The seven seas are but a thimble of water compared with this range of space. These questions and a thousand more are pressing now for an answer.

Is it not unthinkable that millions of planes shall fly through space without police regulation? Who shall police this common territory?

Logic cannot answer, history is silent, experience is absent. Some government must legislate, and much of it by the courts.

But let us turn for a moment to the articulate presumptions of the law and examine just one of them, that preposterous absurdity, the presumption that every man knows the law. How they learned it we need not bother to find out.

In Mississippi it is perfectly conformable to the right of trial by jury and due process of law to try a case without giving the jury any instructions as to the law, and if the jury is not instructed as to the law of the case, the Court will presume that the jury knew the law.[3] The logic is faultless and you have here a perfect syllogism.

All men are presumed to know the law.

These jurors are men.

Therefore, this jury is presumed to know the law.

But the Court has held in a legion of cases that a new trial will be ordered when the trial judge gives a prejudicially erroneous instruction. We must therefore modify our syllogism.

All men are presumed to know the law except jurors who have been instructed by the court.

This jury composed of men was instructed by the Court.

Therefore this jury is not presumed to know the law.

But in both we have an impossible assumption in the major premise, for all men are not presumed to know the law. A wise public policy merely says that whether they do or not cannot be made an issue in the case and that it is immaterial whether they do or not; except where it can be made an issue in the case within itself.

Am I illogical, inconsistent and a perpetrator of *non sequiturs?* Then you will please remember that I have been long a student in the schools of the Courts and as a true and loyal alumnus I reflect and respect the teachings of my Alma Mater.

Logic is a potent instrument in reaching a conclusion from an established and limited major premise, but is of no help in finding a legal major premise.

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[3]*City of Canton* v. *Hart,* 141 Miss. 655.

GROSS INCOME TAX AND GENERAL SALES TAX AS A SUBSTITUTE FOR STATE AD VALOREM TAXES*

D. H. Waits†

Capable of so many inflections and variations in its actual application, the sales tax can be considered and discussed from as many angles, each of which, for a full understanding, would involve an infinite mass of detail.

The problem of taxation in general has always been one of the most troublesome of organized society. Every government throughout all history has had its troubles with it. The subject, therefore, is not new but as old as government and organized society.

However, the proposal for reducing or replacing ad valorem taxes by substituting other sources of revenue such as the gross income tax and the general sales tax for state and local purposes, is a comparatively modern idea, though every state in the Union is familiar with some form of the sales tax.

Recent economic and social developments have placed our antiquated tax systems, which rely heavily upon tangible property, to a severe test. So great, indeed, has been the strain upon tangible property owners recently that students of government and tax authorities view the present situation with alarm. A vigorous and insistent wave of protest has arisen in almost every state in the Union; in fact, in some states it is becoming an open revolt against ad valorem taxes against tangible property. Taxes on tangible property have doubled and trebled within the last generation. This increase, occurring at a time when we have experienced the worst world-wide business depression in history, and when the ability to pay of the average citizen has declined to an alarming degree, has created a grave and far-reaching economic and social problem, and for this reason, therefore, it is being discussed generally in an effort to find a satisfactory solution. As usual, no panacea has been found. The problem is too complicated, too complex and too involved and bound up with our entire economic existence and political institutions, to be solved in

*The substance of this article was given in an address before the Houston Chapter of the National Association of Cost Accountants.

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one sweeping change. Improvement and reform must of necessity come little by little over a period of years, and lasting progress be made through revolutionary developments rather than through any single revolutionary measure.

This deplorable situation has not arisen overnight, nor has it arisen without cause. The evil day has been long in the making. The World War with its aftermath of deflation, inflation and depression has merely brought the problem to a head. Foremost among other contributing causes might be mentioned such factors as the increased costs of government, governmental inefficiency, waste and extravagance, and excessive public indebtedness; and were it not for any or all of these factors there would probably be no outcry against our state and local systems of taxation, it being estimated that at the beginning of the business depression in 1929, 65% of all state, county and municipal taxes levied and collected, were ad valorem taxes of some kind or description. Today we are burdened with ad valorem taxes on tangible property that are almost confiscatory and absolutely ignore a principle originally considered to be one of the main criteria on which all taxes should be based—earning capacity and ability to pay.

With the rapid economic changes and increased demands made on governments during the last decade it has become apparent to all that the ad valorem or property taxes are insufficient to meet the needs and demands on government and must be supplemented at least in part with other forms of taxes. To meet this demand at first the states entered upon another and different field of taxation, the net income taxes, which for a while relieved the pressure upon the property taxes; and if it failed to lower the property taxes it at least removed for the time being the necessity of increasing them. The Federal Government and most of the states adopted this form of taxation, but with the advent of the business depression the state net income taxes have produced less and less income until now the percentage produced by them is negligible.

The United States is one of the few countries of the world in which the general property tax continues to produce the bulk of state and local revenue. The original conception that all property receiving the protection of government should make a direct contribution to the expenses of government is eminently sound, but in practice it is almost impossible of application. Tangible property from its very nature cannot escape taxation but intangible can and does escape taxation. To meet this situation thirty-one states have adopted con-

stitutional changes that permit the classification of property for taxation and have abandoned any attempt at the uniform assessment of intangible property with tangible property. In many states where the net income taxes have been adopted intangible property is entirely exempt. The tendency in recent years has been to depend less and less upon the general property tax and to substitute some form of the sales tax or gross income tax.

While most people believe that sales taxes are of recent origin, they are, in reality, as old as history. Various forms were levied in ancient Egypt and Rome, during the Middle Ages, and especially during the seventeenth and eighteenth centuries. They varied in form and rates and were never really a permanent method of taxation, being always abandoned after being in operation a very short time, because of the furor and upheaval that they created. In most cases, they were levied as war taxes, or under the guise of some other dire and immediate necessity, and were in the main levied for only a short time. Except in the case of the hated Alcavala in Spain, which was a tax of five to twenty per cent of selling prices, most of the heavy sales taxes were regarded as temporary relief measures and soon abandoned. In the United States the Federal Government during the Civil War levied a comprehensive tax on manufactured goods but the attempt to supplement it with a general sales tax met with defeat. Modern sales taxes began with the recent World War, and have been steadily increasing since that time. Today nearly every state in the Union is familiar with and uses the sales tax in some form.

A sales tax, in its narrowest sense, is a tax laid on the sale or transfer of commodities or properties. This definition has important limitations, however, since the term as used in the statutes of the different governments includes a series of taxes rather than a specific source of public revenue. Included in the series are: (1) excise taxes, (2) production taxes, (3) severance taxes, (4) taxes on privilege, (5) general sales taxes, (6) special sales taxes, and (7) luxury sales taxes.

The first of this group, the excise, has no very definite or exact meaning. One tax authority has disposed of it with a statement that, "If a tax is not a property tax or a capitation tax, it is properly classified as an excise tax."[1] It is a tax levied "on the manufacture, sale or consumption of commodities within the country, on licenses to pursue certain occupations, and on corporate privileges."[2] It is, there-

[1] 1 Cooley, Taxation (4th ed.) § 42 (1924).
[2] *Ibid.*

fore, a term rather loosely used and may include all the taxes listed above. In America the tax is usually thought of as a tax on consumption, while a narrower meaning often given it limits it to a tax on consumers' goods with the idea of regulating the consumption of the commodities taxed, as the Federal excise on whiskey, tobacco and playing cards. The courts have given the term a much broader meaning than either definition, however, including within its scope even the Federal corporation and capital-stock taxes.

A production tax is a tax on manufacturers' and other producers' goods. It may take the form of a tax on products in their natural or "raw" state, such as iron ore. It is also levied on goods of manufacturers, canners, etc., who manufacture or "process" commodities for sale.

A severance tax is a tax levied on businesses engaged in "severing" from the soil natural resources, such as coal, oil, lumber and ore. It is also called a "depletion" tax, since by the very nature of things such businesses tend to exhause those natural resources. If the tax is levied on the unit of the commodity, barrel of oil or ton of coal, without reference to the market price of these commodities, as in Arkansas, it bears little resemblance to a sales tax. If, however, the "measure" of the tax is the value of the commodity when offered for sale the tax has some of the characteristics of sales taxes.

A number of taxes are levied as privilege taxes, which, because of their economic effects, may be placed in different classifications. Such a tax levied at a flat rate on all businesses or occupations without reference to the gross business or net income of such businesses is a very different tax from one that is graduated according to these criteria. Simply stated, a privilege tax is levied on persons and corporations for the right or "privilege" of engaging in certain occupations or businesses under the protection of the government granting the privilege. The privilege of one corporation may be much greater than that of another if measured by the "size" of the two corporations. If the tax is graduated according to the capital stock, it may be referred to as a "capital-stock" tax. Again, if the privilege is measured by the volume of business and the tax graduated according to the net income, the tax is an income tax. Such a privilege tax may be classed as a sales tax, if the tax is measured by the gross business or turnover during the tax period, no account being taken of the "net" profits of the business taxed.

> "The characteristic of a general sales or turnover tax is that it attaches, directly or indirectly, to all commodity and property

sales in a prescribed general class or classes, such as sales at retail, sales at wholesale, manufacturers' sales, and so forth. Consequently, except for special exemptions and discriminations, it extends uniformly to all commodities and property entering into sales transactions."

It will be seen from this description that it is, in reality, not one tax but a series of taxes. "The general sales or turnover tax is not a distinct and single form: it is a classification under which several individual and differentiated taxes have been drawn together and grouped on the basis of certain common features and similarities." They may be divided into two classes: (1) multiple-turnover taxes and (2) single-turnover taxes. If the tax is levied on several or all transfers or stages in the economic process—that is, on each stage from the raw materials that are used in the manufacture of the article through each transfer until it reaches the consumer—it is a multiple-turnover tax. A single-turnover tax is levied on only one of the stages through which the commodity travels, as in the case of a manufacturers' tax or retail sales tax. A multiple-turnover tax, therefore, may include a severance tax, a manufacturers' tax, a tax on sales at wholesale, on retail sales, and many others, depending on the number of economic stages through which the commodity passes in reaching the consumer.

Special sales taxes are levied on one or more designated commodities or products, as for example, gasoline.

What are luxuries and therefore what constitutes a luxury sales tax are questions on which legislators and people in general differ. To answer the question it would be necessary to have an agreement on what things constitute the necessities of life. If the question is answered by including food, clothing and shelter only, then a tax on automobile and radio sales would constitute a luxury sales tax. The important point to be kept in mind is that such taxes are often levied to offset the economic inequalities of the general sales taxes. If general sales taxes are in fact passed on by the manufacturer and dealer to the consumer in the form of increases in the prices of the commodities, then such taxes bear with undue weight upon the lower classes of society, since a greater percentage of the income of these classes is used in procuring the necessities of life than is the case with the more wealthy. General sales taxes, according to this assumption, violate the principle that taxes should be graduated according to ability to pay. The luxury sales tax, in some degree at least, operates to distribute the tax burden according to this principle.

The greatest change that has come over the tax systems of nations in many years has been the almost universal adoption recently by industrial countries of some form of the general sales or turnover tax. Great Britain and the United States are the only important industrial nations that have not come to it as a permanent part of their revenue sources.

The drain on the national treasury occasioned by the outbreak of the World War led Germany to impose a commodity transfer tax in 1916. The tax was based on an annual return of sales and amounted to one-tenth of one per cent. The rate was raised during the war, its scope being extended to practically all sales; and it was supplemented by a luxury sales tax of ten per cent. France followed the lead of Germany and in 1917 passed a retail sales tax law which imposed a two-tenths of one per cent tax. A supplementary luxury tax of ten per cent was levied by the same law.

After the World War the European governments, struggling under severe financial burdens, evolved and speedily adopted the general sales tax as it is used today; and with them it has become second only to the income tax as a revenue producer.

Among the 40 or more countries that have enacted sales tax laws, other than Germany and France, are Belgium, 1926; Italy, 1923; Austria, 1922; Hungary, 1921; Czechoslovakia, 1919; Poland, 1923; Canada, 1920; Bolivia, 1923; and Brazil, 1922.

Each of the foreign governments has worked out its own modifications of the tax. In Canada, it applies to sales made to retail dealers only, whether by manufacturers, wholesalers, or jobbers. In others it may be levied on all sales, and a single commodity may be taxed five or six times in its course from the original raw material to the ultimate consumer. The Canadian form is usually known as a single-turnover tax, while the latter is a multiple-turnover tax. Naturally, the rate for each sale is lower in the latter, while administration is much more complex and evasion correspondingly easier. In still other instances the tax may apply to retail sales only.

The Canadian turnover tax as it stands today is the product of rapid and sweeping changes carried out year by year since 1920. The list of exemptions has been repeatedly changed. The rates were raised from one per cent in 1920 to six per cent in 1923, and then stepped down, one per cent a year, to three per cent in 1928, and elevated to four per cent in 1930. Likewise, methods of all collectings have been adjusted and readjusted. In other words, the tax has been going through a period of intense experimentation and evolu-

tion. Much thought has been given to provisions for certain payment once, without exacting payment twice on any commodity. While sales from a manufacturer or a wholesaler to a retailer are subject to the tax, sales at wholesale to a manufacturer, wholesaler, or jobber of goods that are to go through further processing, are exempt. At least this is the broad intent of the law. The yields of the turnover tax in Canada have varied greatly. In 1920-21 they were $38,128,000. In 1923-24 they reached a peak of $100,990,000, and in 1927-28 they were $72,100,000. In this last year they amounted to 34.7 per cent of the total internal revenue and to 19 per cent of the Dominion's total tax revenue.

In European countries, as in Canada, methods, rates and lists of exemptions vary from year to year and from country to country. Italy requires the use of revenue stamps attached to invoices or bills of sale, these stamps or the cash being sent directly to the collector of Internal Revenue after every sale. Belgium uses much the same system. In Germany, France, Austria and Canada returns are made monthly, based on sworn statements of turnovers. In many countries returns are made quarterly.

Wherever the multiple-turnover tax has been employed, considerable difficulty has been encountered in equalizing the burden between a manufacturer who buys a partially completed product, performs one operation and resells it, and the manufacturer who performs many operations in converting the raw material into the finished product. The most successful method of avoiding discrimination against the single-process manufacturer seems to be to lump the various operation taxes of the multiple-process manufacturer and assess the whole as the product leaves the plant. Efforts at taxing the various steps within the plant have been far from satisfactory. Under any system, administration of this form of tax is much more complicated than for a single-turnover tax like that used in Canada.

The Federal Government has never levied a general sales tax in any of its modified forms, but from time to time has been compelled to levy special sales taxes to raise revenue demanded by unusual circumstances or conditions, usually for the purpose of conducting a war or for meeting the expenses incident to the closing of wars and the payment of debts caused by war. During the Civil War it levied a comprehensive tax on manufactured goods but the attempt to supplement it with a general sales tax met with defeat. Many sales taxes, especially on "luxuries," were adopted during the late World War.

During the last few years various forms of general sales taxes and manufacturers' taxes have been advocated in Congress, but to date no

such tax has been enacted, the Federal Governments having in lieu of levying this kind of tax levied various special sales taxes. The revenue from intoxicating liquors has removed the immediate necessity of the Federal Government's enacting a general sales tax or gross income tax.

A sales tax in its general form, though often considered by various American States, was never adopted by any state until recent years. Because of increased demands for public money and a corresponding shrinkage in the state's revenue, caused by the uncertain economic conditions since the World War, and especially since the beginning of the present economic depression all over the world, various forms of sales taxes have been enacted in twenty-six states and agitated in many others.

The tax on gasoline is used in all the American States and the tobacco tax is at present used by thirteen states.

Most states have special sales taxes, or what are sometimes called excise or consumers' taxes. The excise tax on gasoline is universal. About one-fourth of the states levy other kinds of consumption excise taxes, mainly on tobacco, cosmetics, soft drinks and other luxuries. South Carolina has carried consumption taxes further than any other state and derives a large part of its revenue from this source. Severance taxes varying in form are levied in Alabama, Arkansas, Louisiana, Kentucky, Minnesota, Mississippi, Montana, New Mexico, Oklahoma, and Texas. In most cases the tax is based on the gross market value of the material extracted or severed from the soil or waters.

West Virginia was the first state to set out deliberately to adopt a thoroughgoing sales tax when it put such a measure into effect on July 1, 1921. Its adoption arose out of the need for more revenue to meet the increased cost of government, a condition that has occasioned much more comment among our states in recent years than this obvious means of meeting the demand. At first the feeling was general in West Virginia that, since more revenue was needed, the coal mining, oil and natural gas industries should pay a larger share of the total; and a bill was initiated to tax those industries. By the time that bill emerged, however, it had grown considerably, and provided for a gross sales tax on all sales—commercial, industrial and casual. Products of mining or of oil, gas and other minerals pay rates that vary from .42 per cent for coal to 1.85 per cent for natural gas. Manufacturers pay a rate of .21 per cent regardless of whether the goods are delivered within or outside the state, and gross incomes of contractors, amusement houses, and all other businesses pay rates varying with the business. Returns are made quarterly through sworn statements. The new tax replaced the corporation net income tax, which in its last year of

operation, 1920-21, provided $1,332,000. In 1921-22 the new tax brought in $1,462,379, and the following year, $2,708,000. In 1925 the rates were increased to those mentioned above, and in 1927-28 it brought in $3,805,078. The total amounts collected by this state under the gross sales tax law since 1921, including the year which closed June 30, 1930, aggregate $28,179,558.37, the annual yield since 1925 being between three and a half and four million dollars.

This tax on sales furnishes more than one-sixth of the entire revenues of West Virginia.

In West Virginia, the sales tax might be considered as an occupational, or privilege tax, based on gross receipts, and the title of the act designates it as a "tax upon the privilege of engaging in certain occupations." It provides what is in reality a selective gross sales tax at different rates, which is considered the least objectionable of all gross sales taxes. In the original act, professions were included, but the law was amended in 1925 by changing the rates on the different classes and by exempting professions and sales not carried on for profit.

The present rates on the percentage basis are as follows: coal, .42; oil, 1; gas, 1.85; other minerals, .45; timber, .45; manufacturers, .21; retailers, .20; wholesalers, .05; banks, .30; steam railroads and pipe lines, 1; telephone, telegraph, express, electric light and power companies, .30; street railroads and other public utilities, .40; contracting business, .30; amusement business, 1; all other businesses, .30. An exemption of $10,000 annually, is granted by the West Virginia law. Costs of collection of this tax have steadily decreased, amounting in 1930 to 1.18 per cent.

The West Virginia sales tax was declared constitutional by the Supreme Court of the United States, in a test case on the "equal and uniform" section of the State Constitution.[3]

In Pennsylvania there has been a mercantile license tax on both wholesale and retail sales since 1821. While originally designed to tax the sales of dealers of foreign wares it was amended in 1841, to cover all dealers. In 1932 the Pennsylvania Legislature levied a one per cent gross income tax on all sales of tangible property by vendors to consumers.

In reality, Mississippi was the second state in the Union to enter the general sales tax field with the enactment in 1930 of a classified sales tax. Prior to this time Mississippi had already followed her sister States and levied a gasoline excise tax of one cent per gallon in 1922. This tax has been steadily increased, being raised to six cents per

[3] *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284, 47 Sup. Ct. 639, 71 L. ed. 1049 (1927).

gallon at the 1932 Session of the Legislature. The receipts from this tax, on the whole, have been used by the State Highway Department to build and maintain State highways. In 1930 a ten per cent admission tax was levied on all places of amusement in the State except those promoted by religious and charitable organizations. In 1930 Mississippi joined her twelve other sister States by enacting an excise or consumers tax of 20% on all cigars and cigarettes. This tax was originally placed upon the retailer but in the 1932 Act the wholesaler was made the collecting agency and the returns after this amendment have been gratifying. Recent investigation has shown that the 1932 Sales Tax in Mississippi was not the first sales tax levied by that State. Contrary to current knowledge Mississippi made use of the sales tax for a period of more than fifty years, having inaugurated its use in 1815 and retained it until the adoption of the general property tax in 1870.

In 1930 a gross sales tax was enacted in Mississippi upon the recommendation of a join House and Senate revenue committee.[4]. The measure was vigorously opposed, and its enactment represented a compromise upon which opposing interests could meet. This sales tax is very similar to that of West Virginia, and was levied under the guise of a privilege tax and specifically provides that it is in addition to all other taxes. An exemption of $5,000 was given, as well as the sum total of all privilege taxes paid to the State. Certain non-profit organizations were also exempted. The railroad, telephone and telegraph companies were specifically exempted, and were taxed an added amount in the form of privilege taxes to take care of these exemptions. The rates levied were as follows: oil, natural gas, limestone, sand, gravel and other mineral products, and timber, 1 per cent; brick, drainage tile, building tile, sewer pipe, Portland cement and Portland cement products, bottled soft drinks, and ice factories, ½ of 1 per cent; cotton seed oil mills, 1/8 of 1 per cent; all other manufacturing, 1/10 of 1 per cent; retail, ¼ of 1 per cent; wholesale or jobber, 1/8 of 1 per cent; all other manufacturing, 1/10 of 1 per cent; street railroads, water works, gas companies, electric light and power companies, ½ of 1 per cent; contracting, ¼ of 1 per cent; all amusements, 1 per cent; and all other professions and occupations subject to privilege taxes, ¼ of 1 per cent.

The returns from this tax were very discouraging, it having produced only $319,387.70, from June 1, 1930, to April 1, 1932. It cost approximately 8 per cent of the gross to collect this tax due to opposition to the tax and inefficiency in the collecting office.

[4]Laws of Mississippi, 1930, ch. 90, p. 224.

When the regular session of the Mississippi Legislature met on January 5, 1932, it faced a state deficit of approximately $14,000,000, which continued to grow daily. In this emergency the legislature was compelled to turn to the general sales tax as the only available method of meeting the state's financial crisis.

After a long and bitter Legislative fight lasting sixteen weeks the Legislature in 1932 passed the now famous House Bill number 328, amending the general sales tax law of 1930 so that its rates are as follows: oil, 2 per cent; natural gas, 2½ per cent; limestone, sand, gravel, or other mineral products, 2 per cent; timber, 2 per cent; brick, drain tile, building tile, sewer pipe, Portland cement and Portland cement products, and clay products, 1 per cent; ice factories, ¼ of 1 per cent; cotton seed oil mills, ¼ of 1 per cent; all other manufacturers on whose gross income a tax is not otherwise levied in this act, ¼ of 1 per cent; retail sales, 2 per cent; wholesale or jobbers, 1/8 of 1 per cent; automobile dealers or agents, 1 per cent; all public utilities, other than electric light, power, gas, etc. 2 per cent; electricity and gas, when sold for industrial purposes, 1 per cent; and when sold for all other purposes, 2 per cent; contracting, 1 per cent; all professions and other callings, subject to a privilege tax, 2 per cent.

An exemption of $1,200.00 per annum is allowed; but no credit is allowed for the amount of privilege taxes paid, as authorized by the law of 1930. Places of amusement, taxable under the admission laws of the state, and certain charitable and non-profit sharing organizations are specifically exempted from the provisions of the act.

Under the 1930 law, quarterly returns were required, while the 1932 law requires a report to be made monthly, except where the tax payable does not exceed ten dollars per month, in which event a return is made quarterly. The 1930 act required the quarterly return to be made under oath, and the 1932 act requires a monthly report to be made without oath, and a yearly return to be made under oath. The enforcement of the 1930 act was placed in the State Tax Commission, while the enforcement of the 1932 act is placed in the Chairman of the State Tax Commission. It was learned by experience with the 1930 act that a tax of this kind cannot be properly and efficiently collected by a Commission; therefore, the Administration of the 1932 Act was placed in one man, the Chairman of the State Tax Commission, and to him was delegated full and complete power to administer and collect the tax. Governor Connor was very fortunate in his selection of Hon. A. H. Stone, an eminent tax authority, for this position, and to Mr. Stone is due much of the credit for the phenomenal success of this tax. Immediately upon entering office Mr. Stone reorganized the en-

tire Tax Commission and placed it upon a business basis. He was enabled to do this because the Legislature in 1932 did a unprecedented thing toward him and allowed him full reign and authority to hire and pay his employees whatever he thought they were worth, save only that he could not exceed his appropriation. Mr. Stone has the confidence of the people of Mississippi to an unusual degree, and to him more than any one else is due the success of the Mississippi gross income and general sales tax. This law went into effect on May 1, 1932, and the collections made under it up to and including January 4, 1934, amounted to $4,118,722.70, being something like 20% more than the Legislature estimated it would produce, and being about one-fifth of all state revenues collected. The actual cost of collecting this tax has amounted to approximately 3.8 per cent of the total amount collected, and included in this has been the unusual and extraordinary cost of setting up a new system and educating the people to make the proper returns, and also the added cost of securing statistics that are very valuable in the study of this method of taxation. The Mississippi gross income or sales tax is a tax levied under the guise of a privilege tax and specifically provides that it is an added and additional tax.

The Mississippi tax was levied because of the unusual conditions facing the state; and it was called and is known as the EMERGENCY REVENUE ACT of 1932,[5] and is automatically repealed unless re-enacted prior to June 31, 1934.

Most of the opposition originally against the Mississippi tax has been removed and it will be re-enacted at the present Session without the acrimonious debate and fight accompanying its passage in 1932. At that time the merchants were the leading opponents of the tax, but since that time they have changed their attitude and a majority of them now favor the tax. This is due to the fact that they have learned by experience that the tax is in reality a consumers' tax and though the tax is levied against them it is passed on to the ultimate consumer. The fight in the Legislature this year will not be on the tax, but will be to keep the tax from being raised to three or five per cent. Many administrative changes will have to be worked out in the re-enactment, and it may be stated without fear of contradiction that the $1,200.00 yearly exemption will be eliminated. This exemption, like most exemptions, has merely served as a flood gate for tax evasions, and the friends of the tax realize that it must be eliminated. The Mississippi tax was not levied as a substitute for the state ad valorem tax but was levied solely to prevent an increase in the already overburdened state ad valorem taxes. It is the ambition of the

[5]Laws of Mississippi, 1932, ch. 90-95, pp. 176-268.

present administration in Mississippi to reduce gradually and finally eliminate the present eight mill ad valorem tax levied for state purposes, and substitute the gross income or general sales tax instead. It is not too optimistic to predict that this can ultimately be done in Mississippi with the return of normal conditions in business. The estimate for the 1932 tax was based on twenty-five per cent of the estimated retail sales in Mississippi for 1929 made by the United States Department of Commerce. With the return of normal conditions it can readily be seen that the eight mill ad valorem tax levied for state purposes producing approximately four and one-fourth million dollars per year, can be entirely eliminated and leave the ad valorem field of taxation entirely to the local districts. However, if this is done in Mississippi the tax problems will not have been eliminated for the simple reason that the property tax burden is local rather than state wide. In the average county of the State the total ad valorem tax levy is approximately fifty mills—of which amount only eight mills are levied for state purposes, which levy will be eliminated if the present program is carried to its ultimate conclusion.

The writer is of the opinion that the solution of the present tax problems lies in the use of ad valorem taxes for local purposes alone (and that by classified property taxation), the state depending on the net income tax, special sales taxes, and gross income or general sales taxes, for its sole support. Originally the constitutions of most states required that all property must be taxed uniformly and equally. This provision has proven to be more of a detriment than a safeguard and already thirty-one states have amended their constitutions so as to provide for a classified property tax, leaving only seventeen other states where taxes must be levied uniformly and equally.

Under our modern conditions, where it is more expensive to own a home than to rent one, it is necessary that the homesteads be given some relief if we are to continue our past policy of encouraging our citizenry to home ownership. Under a classified property tax homesteads can be levied upon under a different rate and given the preference that they deserve; and at the same time the public utilities can be taxed at a higher rate, and be made to pay taxes where they are escaping taxes under our present system because of the complexities of our federal system of government and the inability of the states to place taxes on interstate commerce. It is the belief of the writer that it is necessary to have classified property taxes for the reason that they will both increase the revenue to be derived, and at the same time simplify certain administrative features that cannot be reached in any other way. Under a classified property taxation system, farm lands,

and urban real estate can, and should be, eliminated from all ad valorem taxes; and at the same time the state and local district could be authorized to levy and collect from railroads and other public utilities taxes that they would otherwise escape if all ad valorem taxes were entirely eliminated.

The writer believes that the state net income tax laws should be amended in all states, so as to reach only the large incomes and exempt net incomes of $5,000.00 and less, which can be reached by a general sales tax in a much more satisfactory manner. This tax, with a gross income or general sales tax of not more than three per cent, should produce sufficient revenue to meet all the demands on the states, save perhaps for roads, schools or other special purposes; and this need could be met by a series of special sales taxes on gasoline, tobacco, cosmetics, and the like. Any tax, taken alone, can be proven unjust and burdensome, and this is especially true of the general sales tax. It strikes at those with small incomes most because they must consume a greater proportion of their incomes than more fortunate people. This inequality can be corrected by a net income tax on incomes of over $5,000.00, and also by special sales taxes on such articles as gasoline, tobacco, malt, cosmetics. In this way states can leave the entire field of property taxation to the counties and municipalities and thereby accomplish a reform in taxation that is not only demanded but urgently needed if our economic system is to survive.

To Illinois goes the distinction of being the first American State to carry out this reform. Her legislative act a few weeks ago substituted a general sales tax for all ad valorem taxes levied for state purposes, thereby leaving the ad valorem tax field entirely to the counties and municipalities of the state. This is the reform that Mississippi has hoped to accomplish for the last few years, but due to the fact that her financial situation is worse than that in Illinois she has been unable to accomplish this change at present. However, Mississippi will probably reduce her ad valorem tax levied for state purposes this year something like two mills instead of the eight mills now levied; and it is hoped that she can gradually substitute the sales tax for the state ad valorem taxes entirely, and that within the next year or so.

Another thought on this matter is that the effort should not be abandoned if, and when the state ad valorem tax is eliminated, for the reason that experience has shown that where the state ad valorem tax is reduced the counties and municipal authorities are prone to elevate their own ad valorem taxes in the same ratio that the state ad valorem tax has been lowered. In Mississippi a good illustration of this oc-

curred in 1926, when the state ad valorem taxes were lowered one-fourth by the Legislature and the local authorities immediately elevated their ad valorem tax rate just enough to take care of this decrease. State legislatures can and should prevent this by limiting the power of the local authorities to increase ad valorem taxes over those now levied.

For years there has been a great deal of agitation for the complete separation of the sources of state and local revenues, and although the plan has much merit, so far, it has not gained much headway. This is just another illustration of the chaotic conditions of the tax system in the United States and the utter absence of reason or a proper tax philosophy.

Yet the United States started out in 1787 with something akin to a tax philosophy. The framers of the Federal Constitution assumed that the National Government would subsist on the proceeds of custom duties and a few excise taxes; and it is also apparent that those who drew the early state constitutions, on the other hand, looked to the field of direct taxation as the main source of their revenue. Both the Federal Government and each of our forty-eight states possesses power of taxation in almost unrestricted forms. The Federal Government has power to levy any form of tax, except poll taxes and taxes on real estate. It might even assess these, provided it proportions the levy against the states according to the population as the Constitution requires. The states, on the other hand, may tax anything except imports, exports and the agencies of the Federal Government. Moreover, they may delegate this power to tax to their counties, municipalities, and other political subdivisions.

The inevitable consequence of this overlapping of the power to tax is that the different tax authorities have entered into a spirited competition with one another, each giving heed to its own necessities with scant regard for the fact that the tax payer is being hit twice in the same place from different directions.

For this reason it is not only necessary but mandatory that this reform in taxation should be made immediately, and that the states substitute as soon as possible the gross income tax and the general sales tax coupled with other special sales taxes for the present ad valorem taxes levied for state purposes, and leave the ad valorem tax field entirely to the local taxing subdivisions, under proper limitations.

In conclusion, viewing the foregoing retrospectively, it may be stated that various forms of general sales taxes, in conjunction with proper net income taxes, offer an inviting field for exploration and experimentation, and possess possibilities for the solution of many of our

tax problems. However, the change to this method of taxation should be slow and gradual, so that the rank and file of the people can have the opportunity of being educated to accept it. We will not then have a duplication of our experiences with the Eighteenth Amendment—a good example of a situation where law enactment was far in advance of the sentiment necessary for proper law enforcement.

This problem should be met as follows: delegates from the various states should meet in a convention and formulate agreements as to the kinds and maximum rates of general and special sales taxes to be enacted by each of the states, and should agree upon a graduated scale by which this maximum rate should be attained in all states at the same time. In this way, the sales taxes can be increased gradually and uniformly in each state until the final maximum is reached, thereby eliminating most of the objections advanced against this method of taxation, and at the same time educating the people to accept this radical and necessary addition to our taxing system, and relieving the people of the unjust property tax burden, at least as far as state ad valorem taxes are concerned.[6]

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[6]The question of the constitutionality of a sales tax has arisen in *Moore* v. *State Board of Charities and Corrections*, 239 Ky. 729, 40 S. W. (2d) 349 (1931); and *In re opinion of the Justices*, (Mass.) 186 N. E. 49 (1933), noted in 2 *George Washington L. Rev.* 253 (1934). In both of these cases it was held that such a tax did not violate the respective state constitutions.

JUDICIAL ADMINISTRATION IN MISSISSIPPI

P. S. Sikes†

II. The Intermediate Courts*

There is no single trial court of general unlimited jurisdiction in Mississippi. Two courts jointly possess the powers often conferred upon a single superior, district, or circuit court in other states. These courts we designate "intermediate courts." They are the chancery court and the circuit court. Each will be treated in turn.

The Chancery Court. The state is divided into eleven chancery court districts in each of which a judge of the chancery court is popularly elected for a term of four years. Each chancery judge is required to hold at least two terms of court annually in every county of his district. The court has jurisdiction in matters in equity and certain other matters, including divorce and alimony, matters testamentary and of administration, minors' business, cases of lunacy, idiocy, and persons of unsound mind, and suits on bonds of fiduciaries and public officers. The judges of this court have power to grant certain extraordinary writs such as writs of injunction, *habeas corpus,* and *coram nobis.* In recent years they have been given some purely administrative duties, particularly in connection with children's aid funds and the organization of drainage districts.[1]

There are no officially compiled statistics in the state that would indicate the actual nature of the work being done by the chancery court. A list of the cases filed in the chancery court of Forrest county during the year 1930 has been secured. It is believed the cases in this list are typical of the cases filed in all the counties of the state. The nature of the cases and the number of each kind are shown in the following list:[2]

Divorce (alimony in some)	120	minority	17
Administration and guardianship	62	Lunacy	17
Removal of disability of		Commitment to industrial home	16

*The first article of this series appeared in the December number. See 6 Mississippi Law Journal, 109.

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[1]Statements relative to the organization and jurisdiction of the chancery court are based primarily upon Chapter 11 of the *Mississippi Code* of 1930.

[2]*General Docket,* Forrest county chancery court, 1930.

Attachment	9	Vacation of property	2
Injunction	8	Cancelling deed of sale, contempt of court, alienation of affections, possession of property, suit on a bond, settlement of a claim, cancelling a mortgage debt, dissolution of a charter, and cancellation of a barber's license (one each)	9
Sale of property	7		
Probation of wills	7		
Specific performance	5		
Removal of cloud on title	5		
Uncertain	5		
Custody of children	4		
Habeas corpus	4		
Committing of drunkard or drug addict to hospital	4		
Adoption of children	2		
Validation of bonds	2	Total	307
Insolvency	2		

A surprising thing that one observes here is the exceedingly small number of equity cases on the list. As originally understood in England and later in the United States, there were five general classes of equity suits, namely: mistake, accident, trust, account, and fraud.[3] But today equity is understood to include many more subjects. Justice Griffith lists thirty-six different subjects of equity jurisdiction in Mississippi.[4] If we take Justice Griffith's list as a criterion, not more than fifteen per cent of the cases in the above list will be included. In other words, it appears that Mississippi's "court of conscience" has become about eighty-five per cent probate, administrative, and legal in nature.

This lack of any considerable amount of equity business before the chancery court naturally suggests the query whether the state should continue to maintain a so-called separate court of equity. In only four other states of the Union is equity administered in a separate court from that administering common law.[5] In another group of states jurisdiction of cases in equity and at law is vested in the same court but the procedure is kept distinct for the two kinds of cases. In the remaining states law and equity are administered by the same court in each and distinctions in procedure have been largely abolished, though law and equity are still recognized as distinct branches of jurisprudence.[6]

With the characteristic lack of judicial statistics in state judicial systems, it is not easy to show which system of law and equity admin-

[3]George T. Bispham, *The Principles of Equity*, 11th. ed., (New York, 1931), 1-20.
[4]Virgil A. Griffith, *Chancery Practice*, (Columbia, Mo., 1925), 25-28.
[5]Arkansas, Delaware, New Jersey and Tennessee.
[6]21 *Corpus Juris*, 24-27.

istration works best in practice. But the writings of publicists and jurists may be cited to show that sharp distinctions in the field of civil litigation between law and equity are believed to be based more upon tradition and custom than upon reason and logic.

In his recent book on judicial administration, Professor Willoughby states:[7]

> "This distinction between law and equity, which finds no counterpart in non-English speaking countries, cannot but be deemed an unfortunate feature of our judicial system. . . . Probably the greatest objection to this system is the complexity that it introduces in the system of judicial administration viewed as a whole. In its practical operation, the existence of the two sets of rules, two classes of remedies, and two courts is productive of trouble, delay and expense. Cases frequently arise when it is difficult, even for the experienced lawyer to determine whether resort should be had to one court or the other for relief."

Professor W. F. Dodd, of the Chicago Bar, thinks the only reason "for the sharp distinction in judicial administration between rules of common law and rules of equity, is that these rules developed along independent lines and led in England some centuries ago to the establishment of independent courts." In legal systems "distinctions, . . . usually remain long after the reason for their existence has ceased."[8]

Judge Baldwin characterized the system of separate law and equity as "intrinsically illogical"[9] The late Chief Justice Taft was of the opinion that the distinction between law and equity courts in the federal courts should have been abolished long ago.[10] It is true the Chief Justice referred to the national courts rather than the state courts, but his statements regarding the merits or demerits of the separate systems of law and equity administration are applicable to the states having such separate systems.

Judge J. A. P. Campbell, a former chief justice of the Mississippi Supreme Court, in a prepared statement which was read to a convention of the state bar, made the following recommendation:[11]

> "Amalgamate the administration of law and equity, . . . and then there would never be any question as to whether a suitor was in the right court. The gain from this would be great. Sixty-

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[7]W. F. Willoughby, *Principles of Judicial Administration,* (Washington, 1929), 235.

[8]W. F. Dodd, *State Government,* 2nd. ed., (New York, 1928), 279.

[9]Simeon E. Baldwin, *The American Judiciary* (New York, 1905), 133.

[10]W. H. Taft, "Possible and Needed Reforms in the Administration of Justice in the Federal Courts," *Reports of American Bar Association,* XLVII, 259-60 (1922).

[11]*Reports of Mississippi State Bar Association,* IV, 88 (1909).

> two years at the bar engaged in cases at law and in equity, except twenty-three years as a judge administering both, have convinced me that much good and no possible harm would come of this change."

Certain provisions of the Constitution of the state are intended to avoid some of the objections often raised against separate courts of chancery. One such provision prohibits the reversal of any case simply because it arose in the wrong court.[12] Of this provision Justice Griffith says:[13]

> "It removed, and removed finally, all the remaining objections that had ever been made, other than by experimentalists, to the separate court of chancery as a fixed and permanent institution in our state."

It may be that any one who raises objections to a separate court of chancery in Mississippi can properly be called an experimentalist, but at least the merging of law and equity administration, or of law courts and equity courts, is certainly not in an experimental stage.

The Constitution also commands the circuit court to transfer equity cases to the chancery court and the latter to transfer law cases to the former, when such cases are brought in the one or the other, respectively.[14] By these provisions the state not only seeks to keep common law and equity matters in their respective courts, but also to remedy the evil which may exist in jurisdictions having separate courts of law and equity whereby a litigant, who makes the wrong choice of tribunal in which to bring a case, may be dismissed from court, thus making an entirely new proceeding necessary or even putting the person completely out of court on account of the operation of the statute of limitations for filing cases.[15]

In spite of the mandatory wording of the provisions mentioned in the last paragraph, they are in effect only directory, and there is no remedy on appeal when a court makes the sole error of assuming jurisdiction of a case of which it rightfully has no jurisdiction on account of its legal or equitable nature as the case may be.[16]

There is at least one other provision in the Constitution of the state which seeks to rectify an evil usually found in a judicial system having a separate court of chancery. The chancery court is authorized

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[12]*Constitution of Mississippi* (1890), § 147.
[13]Griffith, *op. cit.*, 19.
[14]*Constitution of Mississippi* (1890), § 157.
[15]"If a litigant makes a mistake, instead of dismissing him out of court as had been the former practice, he is transferred to the proper court, and the right of action dates from the filing of the original suit." George H. Ethridge, *Mississippi Constitutions* (Jackson, Mississippi, 1928), 285.
[16]*Cazeneuve* v. *Curel,* 70 Miss. 521 (1893).

to dispose of legal matters where such action obviates the necessity for bringing a separate action in a law court.[17] This provision seems quite sufficient to avoid a plurality of suits where the litigation is started in a chancery court, but where a suit involving both law and equity is first brought in a circuit court it may be necessary to bring a subsequent proceeding in the chancery court before complete relief can be secured.[18] At least it is the former court's constitutional duty to transfer the equity features of the case to the chancery court.[19]

What appears as one of the most anomalous features of a judicial system which maintains separate courts of law and equity is that power by which a judge in an equity court may restrain actions in courts of law where matters of equity are involved. The above discussed remedial provisions of the Constitution of Mississippi do not afford relief in this respect, although it was at first believed that section 147 of that document did afford such relief.[20] Recent decisions of the Supreme Court show that this belief was, in the words of Justice Ethridge,

> "erroneous, as the court [in the early case] failed to consider all of the sections of the Constitution enacting a policy of separate jurisdiction, but under section 147 intended merely to have the Supreme Court affirm a correct judgment, in a suit properly tried, by giving all parties their full legal or equitable rights as the case may be."[21]

It is well settled now that the chancery court will enjoin actions at law under certain circumstances. Where, for example, an action involves both law and equity and a proceeding in equity would avoid a multiplicity of suits at law, such action will be enjoined.[22] The chancery court is ordinarily without power to enjoin a suit in the circuit court over which the latter court has jurisdiction. But since the circuit court admittedly does not have jurisdiction in cases involving matters of equity, it may be enjoined in a matter which a chancellor considers equitable in nature. It can be seen that such a situation may, and does, lead to a great amount of unnecessary litigation.

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[17]*Constitution of Mississippi* (1890), § 160. This same evil may exist in a judicial system where the civil business comes before a law division and an equity division of the same court. See Willoughby, *op. cit.*, 235; and Dodd, *op. cit.*, 277.

[18]*Woods* v. *Riley*, 72 Miss. 73 (1894). "Where a court of law first acquires jurisdiction, equity may afford auxiliary relief."

[19]See *supra*, note 14.

[20]*Whitney* v. *Bank*, 71 Miss. 1009 (1894). The court stated in this case that all distinctions between law and equity were swept away after the case was begun.

[21]Ethridge, *op. cit.*, 292.

[22]*Butler* v. *Scottish-American Mortgage Company*, 93 Miss. 215 (1908).

Even in cases that do not involve equity, as understood in the jurisprudence of Mississippi, the chancery court sometimes enjoins actions in the circuit court to avoid a "multiplicity of suits at law." It is difficult to say exactly what the rule is on this point. In a group of purely legal suits against a railroad company instituted by a group of passengers for being unreasonably delayed on a train and all involving the same subject matter and state of facts, prosecution was enjoined and the same upheld by the Supreme Court of the state, to avoid a multiplicity of suits at law.[23] Later in a similar group of cases, however, the supreme court held that in order for the chancery court to assume jurisdiction in order to avoid a multiplicity of suits at law, there must be some recognized grounds of equitable interference, or some community of interest in the subject matter, a common right or title involved, or some common purpose in pursuit of a common adversary, where each might resort to equity.[24] Yet in a still later case the Supreme Court upheld a decree of a chancery court enjoining a purely legal controversy and assumed jurisdiction of three separate suits at common law.[25]

It is not the purpose here to try to determine the true rule of decision as to when equity will be available to enjoin actions at law. Regardless of what the rule may be, the fact is that certain suits may be enjoined. This simply serves to show further that in spite of section 147 and other parts of the Constitution which seek to remove the objections to a separate court of chancery, many objections remain and perhaps will remain as long as this court remains separate and distinct in the state's judicial system.

It can hardly be denied that the chancery court in Mississippi operates with comparative efficiency. Neither would we deny that specialization in judicial administration is a good thing. However, it is not clear that the increased efficiency attained in this court is due to the partial separation of law from equity. It may be that superior methods are used in equity administration, and that these methods should be extended to common law cases. Also, with regard to specialization, in a sparsely populated state too much specialization might easily result in the delay—and often denial—of justice. In Mississippi, now, if a case in an intermediate court is continued from one term to the next it means a delay, in most counties, of six months; but the mini-

[23] *Whitlock et al.* v. *Yazoo and Mississippi Valley Railroad Company,* 91 Miss. 779 (1907).

[24] *Cumberland Telephone and Telegraph Company* v. *Williamson,* 101 Miss. 1 (1910). See also *Roberts* v. *Burwell et al.,* 117 Miss. 451 (1918).

[25] *Talbot-Higgins Lumber Company* v. *McLeod Lumber Company,* 147 Miss. 186 (1927).

mum number of terms of intermediate courts in any county each year is four, or an average of three months apart.

When a case is transferred from an equity to a law court or *vice versa,* it will ordinarily be several months before the case can be heard. It is thus in the matter of administration that, from the standpoint of parties and taxpayers, the chief criticism can be made of the separate court of chancery. This subject, however, is so closely connected with reform of administration in the circuit court that its consideration will be deferred until that court has been considered.

The Circuit Court. In each of seventeen districts into which the state is divided, a judge of the circuit court is elected by popular vote for a term of four years. At least two terms of circuit court are required to be held each year in every county. The circuit court has original jurisdiction in state criminal cases and in ordinary civil matters involving a principal sum of not less than $200. It has appellate jurisdiction in all matters coming in the justice of the peace, municipal and county courts, and in certain matters coming before such bodies as boards of supervisors, municipal councils, the railroad commission, the state tax commission, *et cetera.* The judges of this court are authorized to grant certain extraordinary writs, including writs of injunction, *habeas corpus, certiorari, coram nobis* and prohibition. In civil cases involving not more than a principal amount of fifty dollars and in a few cases appealed from the county court the decision of the circuit court is final.[26]

With this brief statement of the organization and jurisdiction of the circuit court, attention will now be given more particularly to the actual work of the court. From the scope and character of its jurisdiction it is easily surmised that the court is of very great importance in the state's judicial system. Justice Ethridge thinks that

> "the circuit court is the greatest educational institution in the state for the purpose of bringing the law and its administration to the knowledge and attention of the people; through its agencies it carries the law of the state to the people, and informs them of their institutions in connection with their government."[27]

A state law permits a judge of the circuit court to allot the time at each term to the handling of civil and criminal cases. In some districts the district attorney and circuit judge meet a few days before a term of court is to be held in a county and go over the criminal docket to see what cases will most likely be ready for trial at the approaching term. A calendar of criminal cases is then made up by

[26]The legal provisions relative to the organization and jurisdiction of the circuit court are found in *Mississippi Code,* 1930, ch. 12. See also the article in this number on this subject by Justice Ethridge, *supra,* p. 195.

[27]Ethridge, *op. cit., supra,* note 15, 286-87.

the clerk. A list of the civil cases, likely to be called, is prepared by the clerk in consultation with the judge, and is sometimes published in a newspaper of the county. On the first day of a term of court after such preliminaries as empaneling grand and petit juries, charging the grand jury, and often listening to one or more political speeches, the judge holds a session with the lawyers representing litigants in civil cases, sets such cases as are ready for trial and enters such orders as he deems necessary in others. The trial of civil cases usually begins the first or second day of the term and continues for whatever length of time is necessary, or has been alloted to civil business—in the smaller counties perhaps for only a day or two but in the larger counties perhaps for a week or more. While the civil business is being disposed of, the district attorney is given an opportunity to make a hurried study of the criminal cases, to have witnesses summoned, and perhaps to "trade" with some of the persons accused of crime: that is, to agree to pleas of guilty to lesser offenses than those charged, or to the settlement upon payment of costs, *et cetera*. He will also give some time to aiding the grand jury in its deliberations.

In other districts there is no evidence of any deliberate planning for court terms. Witnesses, attorneys, accused persons, and the parties in the various civil suits, are commanded, or advised, to attend the opening day of court. After the usual preliminaries, as described above, the "dockets are sounded" and the cases are set for trial, dismissed, continued, "nol prossed," non-suited, passed, ignored, or disposed of in whatever other manner the judge and attorneys see fit.

In making and carrying out a schedule for the trial of cases it is admittedly difficult to prevent a great deal of loss of time to parties, witnesses and others concerned. It is impossible for any one to say just how long particular cases will take for trial, or what cases will be settled, continued, dismissed, etc., after being set but before being tried. Nevertheless, there is a splendid opportunity for the district attorney, county prosecuting attorney, circuit judge, and circuit court clerk to coöperate to make the court operate far more efficiently than it does now in most counties, simply by a more careful planning and supervision of the trials of the cases on the trial dockets. To give a simple illustration of what can be done in this respect, one might compare certain results in criminal cases in a county where the setting of cases is in some degree planned and witnesses are not allowed to attend court unnecessarily, with corresponding results in a county where cases are apparently set almost at random and where witnesses are often required to attend court much longer than seems necessary. Forrest county serves to illustrate the first type and Leake county the second.

In 1930 there were no extraordinarily long trials in either of the counties mentioned. Forrest had more days of court and more cases actually tried than did Leake. An examination of the pay certificates to state witnesses shows that in Forrest county 178 witnesses drew pay for an average of 1.3 days or an average of $1.97 each, whereas in Leake county 241 state witnesses drew pay for an average of 2.9 days or an average of $4.33 each. (Mileage fees are not counted in either case). In the former county more than three-fourths of the witnesses drew pay for only one day each, while in the latter about one-fourth drew pay for only one day each and some drew as much as seven days' pay, though no case ran for more than two days in either county.[28]

Very little attention seems to have been given to the question of expense and inconvenience to witnesses forced to attend court. There are no available data in Mississippi from which such things can be fully determined.[29] It is apparent, however, that at virtually every term of circuit court there are scores of witnesses forced (or permitted) to attend, sometimes several days and often upon cases that are never tried, and for which attendance witnesses, except state witnesses, may never draw any pay.

A few specific examples from court records will serve further to illustrate the lack of judicious planning in handling cases in the circuit court, as well as to show its cumulative effect upon witness attendance. In state case number 1699 in Forrest county, filed April 26, 1930, in which several witnesses were summoned, the following is the record in the case:[30] April, 1930 term of court, defendant arraigned, plead not guilty, and case set for Tuesday; July (1930), set for second Wednesday; November (1930), continued; January (1931), set for third Thursday; April and July (1931), no entries on the docket in the case; and November (1931), *nolle prosequi* entered. This case was on the court's docket during seven terms of court and was actually set for trial three different times. Assuming that witnesses were properly excused each time and attended only on the days for which the case was set for trial, each defense witness lost three days and the county was put to the expense of paying state witnesses for that number of days in addition to mileage fees. Setting cases and failing

[28]This information was secured from the *Minutes, General Dockets,* and *State Witness Certificate Books,* of the circuit court in the counties of Forrest and Leake.

[29]Under the legal requirements for the keeping of records by the circuit court clerks, one should be able to get complete data with reference to all witnesses' attendance in the various cases but in no county visited were the records found properly kept.

[30]*General Docket,* Forrest County Circuit Court (1930-31).

to get to them on the days named is excusable sometimes, but allowing a large number of cases to drag through as many as seven terms of court seems hardly justifiable.

In this same county the following record is shown for civil case number 1746, filed February 2, 1930:[31] April (1930), set for first Wednesday, continued; July (1930), set for first Tuesday, continued; November (1930), set for first Tuesday, continued; January (1930), no entry on docket; April (1931), continued; July (1931), set for first Monday, continued; November (1931), continued; January and April (1932), no entries; and July (1932), continued. This case has been on the court's docket during ten terms of court and set for trial five different times without having been disposed of finally.

Civil case number 1776 in the same county, filed April 17, 1930, is one in which we can feel sure that everybody concerned lost, except perhaps the attorneys. The record in the case is as follows:[32] April (1930), motion for costs made and allowed (sixty days allowed plaintiff to arrange for costs or a bond); July (1930), pauper's oath taken by plaintiff, case set for second Monday, continued; November (1930), set for first Wednesday, re-set for second Friday, dismissed for want of prosecution. It is impossible to determine from the records what the real reason was for the failure to prosecute this case. It is sometimes cynically said that in courts where cases are allowed to drag along through many terms, or to go through many appeals, the party with the longer pocketbook has the better chance of winning. Perhaps the defendant here had the longer pocketbook, if indeed he had any at all; for the plaintiff disclosed through his taking the pauper's oath that he was a person of very limited means, and it may be that this poor man was denied justice because the case was never brought to trial.

A case well illustrating the careless manner of handling cases in the circuit court, the inconvenience to witnesses, and the economic loss in connection with witness attendance, is state case number 783, appealed to the circuit court of Leake county in 1928.[33] This was an appeal from a conviction in a justice of the peace court on a charge of drunkenness. At the November (1928) term of court the case was set but was never called for trial. The records show that five state witnesses attended court upon the case during this term. One of these witnesses drew pay for twelve days' attendance (there

[31] *Issue Docket,* Forrest County Circuit Court (1930-32).
[32] *Ibid.,* (1930)
[33] *General Docket,* Leake County Circuit Court, (1928-30); and *State Witness Fee Certificate Book,* ditto, (1928-30).

were only twelve days during the term); one for eleven days; one for four days; one for three days; and one did not claim his pay. At the following term of court (April, 1929) the four witnesses who drew pay at the November term before were again listed as state witnesses in the case. This time one drew pay for ten days (the term was again twelve days); one for three days; and two for one day each. The case was never called for trial and in April, 1930, a *nolle prosequi* was entered in it. This particular case cost the county $70.20 for state witnesses, not to mention the various fees paid the clerk and sheriff. There is also to be considered the loss of time by state and defense witnesses at the trial before the justice of the peace, by the defense witnesses in the circuit court, and by the defendant himself.

It is not suggested that all lost motion can be eliminated from the courts; but it certainly seems that considerable improvement could be made in a system in which one witness is allowed to draw pay for twenty-two days out of twenty-four days of court during a year in a case which was set for trial only once and was never called for trial. The circuit court may be an excellent school in which to learn about the administration of law and government, but such practices as those mentioned in the last several paragraphs are poor lessons in economy.[34]

No doubt people ordinarily think of the circuit court as a tribunal in which justice is meted out, in criminal cases, by a judge, and jury of twelve men "good and true" under the supervision of the judge. They perhaps think also that in civil cases issues are likewise decided by a jury or by a judge alone. Such conceptions are erroneous. Only a comparatively few of the cases disposed of by the circuit court are ever tried at all. Most cases are eliminated from the dockets through such methods, in criminal cases, as entering pleas of guilty by the defendants (to the offenses charged or to lesser offenses), dismissing cases by the court, passing cases to the files or entering *nolle prosequis* by the judge at the instance of the district attorney; and in civil cases, by means of compromises, by the taking of non-suits or by dismissals. A study of the minutes or dockets of the circuit court in any county

[34]The Committee on Law Reform of the New York State Chamber of Commerce in its report in 1930, criticised the unbusiness-like calendar practices of the courts in that state as follows: "To hold a large number of people in readiness for trial, sometimes for weeks, and to require them to attend in court awaiting the actual trial, sometimes for several days, is a burden the seriousness of which the courts may not realize. This system may make it easier for the judges, but we suggest that emphasis should be laid upon the convenience of the litigants and the witnesses, and not on that of the judges. The problem is one of efficient business organization which is attainable if the will to attain it is present. . . ." Quoted in the *Report of the Judicial Council of California* (1931), 52.

would perhaps demonstrate the truth of these statements. A few typical examples will be considered.

In Forrest county ninety-five criminal cases were entered on the docket of the circuit court during the year 1930.[35] Of these cases, only twenty-five were ever actually tried.[36] During the same year 119 civil actions were begun in or appealed to this court in the same county and again only twenty-five were ever tried.[37] In the counties of Attala and Leake during the same year there were respectively seventy-five and 107 criminal cases disposed of by the circuit court.[38] In the former county eleven cases were disposed of through trials and sixty-four through other methods during the year, and in the latter the numbers thus disposed of during this period were nineteen and eighty-eight, respectively.[39] The records of civil cases disposed of in these two counties during 1930 were as follows: In Attala forty cases, ten through trials and thirty through other methods; and in Leake fifty-one cases, twelve through trials and thirty-nine otherwise.[40]

It is admitted that the data presented here represent an extremely small percentage of the total number of cases disposed of by the circuit court in the eighty-two counties of the state even in one year, but it is believed they are fairly representative of results in all counties, or in any county. In order to further emphasize the actual methods used by the court in disposing of the cases coming before it, an analysis will be made of the methods of disposition, other than by trial, of the cases filed in the Forrest county circuit court during the year 1930.

During the year mentioned sixty-six criminal cases were placed on the dockets of the circuit court of the county through indictments by grand juries and twenty-nine as a result of appeals from the county court. Of the indictments, only sixteen resulted in trials. The remaining fifty were disposed of as follows: Eleven defendants entered pleas of guilty (one to a lesser crime than that charged in the indictment); a *nolle prosequi* was entered in each of twenty-four cases (one after a plea of guilty had been entered); eight cases were passed to the files (one after a plea of guilty had been entered); a judgment

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[35] *General Docket,* Forrest County Circuit Court (1930).
[36] *Ibid.,* (1930-32).
[37] *Ibid.,* and *Issue Docket,* ditto (1930).
[38] *General Dockets,* Attala and Leake County Circuit Court (1930).
[39] *Issue Dockets,* Attala and Leake County Circuit Court (1930). It should be noted that in the counties of Attala and Leake the cases are those "on the dockets" and cases "disposed of" during the year 1930, whereas in Forrest county the cases "filed during 1930" and "finally disposed of" at any subsequent date are used.
[40] *General Docket,* Forrest County Circuit Court (1930-32).

nisi was taken on the bond in one case; and in seven cases there was no action indicated on the docket, the defendants apparently never having been apprehended. Of the twenty-eight appealed cases, thirteen appeals were summarily dismissed by writs of *procedendo* because the appeals had not been perfected; forfeitures on bonds were entered, and later dismissed, in four; no action was indicated in two; and nine were tried, the county court being affirmed in seven cases and reversed in two.

The statistics in the above paragraph show that there were sixty-six indictments. In each of these at least twelve duly qualified grand jurors thought there was sufficient evidence to warrant the trial of the accused persons in open court.[41] The district attorney, in exactly one-half of the cases, was of a different opinion and he, in effect, declared the accused persons "not guilty" by the use of the *nolle prosequi* or by passing the cases to the files. Thus it appears that the district attorney, and not the petit jury, most often passes upon the guilt or innocence of an accused person. In each of such cases as he disposes of, there is first an *ex parte* hearing before a grand jury in which a person is held to be probably guilty of a crime; in the second place there is an *ex parte* consideration of the case by the district attorney in which the accused is, in effect, declared "not guilty" or else it is decided that the state does not have sufficient legal evidence to bring about a conviction. The system is obviously defective. Either too many innocent persons are being needlessly hailed into court by grand juries, or else too many guilty persons are escaping punishment.

An analysis of the ninety-four civil cases filed, but never tried, in the circuit court of Forrest county in 1930 shows that in forty-four the controversies were settled by the parties. The others were disposed of as follows: In eleven, the cases were transferred to other courts; in nine, the cases were dismissed; in eight, no action was indicated; in seven, default judgments were taken; in six, no final action had been taken (by August, 1932); in five, non-suits were taken; in two, demurrers were sustained (with no further pleading); and two cases were erroneously on the docket. An apologist for the court might get some comfort from the fact that forty-four cases, or more than a third of the total number filed, were settled peaceably by the parties either with or without the aid of the court. However, these settlements did not prevent litigation, they only made trials unnecessary. The fact is that some of these cases were "in court" for as long as

[41]An affirmative vote of at least twelve grand jurors is necessary to return an indictment. *Mississippi Code of* 1930, § 1197.

twenty-five months, and the average time each of the forty-four was on the docket was 5.6 months, although court terms in this county are only three or four months apart. It may be that some litigants were forced by circumstances to accept unsatisfactory settlements rather than contest further in a slowly-moving, expensive court. To say the least, the number of cases settled out of court, and disposed of in court but without trials, indicates that the circuit court does not play the major role in the settlement of cases coming within its jurisdiction.

There is another topic in connection with the procedure in the circuit court that is of interest here—namely, the speed or dispatch with which the court does its work. There are several methods by which it is possible to study this phase of the court's work. The first is to attend sessions of the court and observe it in action and thus get some idea about the speed with which its work is done; the second, to study the dockets and other records of the court to see how much business it transacts in a given length of time; and the third, to study the cases on the dockets to see what length of time elapses between the filing and the final disposition of a case. All of these methods have been used in this investigation. When one considers the number of cases actually tried in the circuit court and the number of days the court is in session each year, the inevitable conclusion is that the court functions very slowly. Of course, any considerable attendance upon the sessions of the court will serve to demonstrate the correctness of this conclusion.

What has been considered thus far, relative to the work of the circuit court, may be said to relate primarily to the personnel factor. It is true that those in charge of the work of the court might do their work more efficiently if certain changes were made in the law, especially the procedural law. The cold records of cases cannot tell complete stories. The actions of judges and prosecutors may often be justifiable, even where the recorded facts seem to indicate the opposite. The fault may be charged to certain well established, but questionable, rules of procedure. Consideration will now be given to some of the rules under which the circuit court functions.

Original criminal cases in the circuit court must ordinarily be started by indictments by grand juries. If there is objection to the grand jury which returns an indictment it must be raised at the time a defendant is arraigned by a motion to quash.[42] It is too late to

[42] *Mississippi Code,* 1930, § 1207. See *Ellis* v. *State,* 142 Miss. 468 (1926); *Bailey* v. *State,* 144 Miss. 467 (1926); and *Wilcher* v. *State,* 152 Miss. 13 (1928).

first object on appeal. When the indictment is defective on its face, objection must be made to it in the trial court, where it may be amended. If an objection is not made at the proper time in the trial court, it will not be heard on appeal.[43]

The trial jury is important in the machinery of the circuit court.[44] There seems to be little difficulty in connection with the making up of the jury lists. Occasionally objections are made to juries on account of alleged irregularities connected with the drawing, or for other defects of the panels in general.[45] A point of more interest here is one in connection with the selection of the jurors for each particular case. This is one of the chief causes of delay in the trials of cases, although it seems that there are very few cases appealed on account of any alleged error in the selection of the jurors for each particular trial.[46] This fact is, we believe, in part explained by the extraordinary leniency of the law, and the judges, in allowing parties to reject veniremen.[47] In trying to determine whether proposed jurors are competent, lawyers often ask all manner of pertinent—and impertinent—questions. This process results in considerable delay in the trials with a resulting heavy expense to the taxpayers.

Many people do not like to sit on juries. With the many questions which the lawyers put to prospective jurors it is often easy for a person to answer in such a manner as to appear unacceptable. This freedom which is allowed parties in determining who will try the facts in their cases does not seem to be justifiable. It is not essential to the preservation of the jury system, as is demonstrated by the present practice in England. Challenging a juror, we are told, is practically unknown in the land where our jury system is said to have originated,

[43] *Mississippi Cod,* 1930, § 1206-07. It was held by the Supreme Court, however, that an indictment for obtaining money on checks "fraudulently" must allege an intent to defraud, and that this fatal error is not waived by failure to demur thereto. *Herron* v. *State,* 118 Miss. 420 (1908).

[44] Except in misdemeanor cases, the jury cannot be waived in criminal trials in Mississippi. *Hunt* v. *State,* 61 Miss. 577 (1884).

[45] See especially, *Ellis* v. *State,* 142 Miss. 468 (1927); and *Chandler* v. *State,* 143 Miss. 312 (1926).

[46] Only one case of this nature appeared in the official reports of the Mississippi Supreme Court during the three years 1926-28.

[47] Under the laws each side is allowed twelve peremptory challenges in capital cases and six in other cases, while any number of veniremen may be rejected where satisfactory cause can be shown.

In reversing a case because the defendant was limited in his questioning of the veniremen, the Supreme Court held that "when the full panel had been procured, pronounced competent, passed upon by the state, and presented to the defendant for acceptance or peremptory challenge, he was entitled to all fair and reasonable means of ascertaining who, and what character of men, he was called upon to accept or peremptorily challenge." *Hale* v. *State,* 72 Miss. 140 (1894).

and examinations of jurors are there conducted by the judges rather than by the parties or attorneys.[48]

In actual practice the system in Mississippi mitigates against the poorer litigant. A party who is unable to employ able attorneys will be virtually compelled to accept whichever jurors are drawn, whereas a party flanked with an array of able counsel will often sift through hundreds of qualified veniremen in order to secure twelve "satisfactory" jurors.

From many points of view the presentation of evidence might be considered the most important step in the trial of a case—especially a criminal case. During the three-year period, 1926-28, more than one-third of the criminal cases reversed by the Mississippi Supreme Court were reversed on account of errors committed in the admission or exclusion of evidence in the trial courts.[49] The actual taking of the evidence consumes a considerable amount of time. Under the system of examining and cross-examining witnesses much time is apparently wasted. Lawyers ask questions that are not calculated to clear up the issues. Often objections are made and exceptions taken to such an extent as to impede the progress of a trial. A witness, no doubt, is often made to wonder whether he or the accused is on trial.

Evidence, intrinsically good, is often ruled out on account of some error having been committed in obtaining it. A person caught point-blank with a suitcase full of whiskey cannot be convicted of possessing whiskey if the sheriff making the "capture" fails to follow the strict letter of the law governing searches.[50] Or, if a person is not formally arrested before an officer seizes whiskey which the former has in a sack, he is not "possessing" whiskey.[51]

Where ordinary laymen see defendants go scot free when the whole community knows "beyond a reasonable doubt" that such defendants are guilty, there is little wonder that the rank and file of our citizenry have lost confidence in, if not respect for, the courts of the land.

The laws of the state provide a positive legal remedy against the illegal acts of law-enforcement officers.[52] If alleged criminals can-

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[48]Pendleton Howard, *Criminal Justice in England* (New York, 1931), 362. An attempt was recently made in Mississippi to give the judge of the circuit court more authority in the conduct of the examination of prospective jurors on their *voir dire*. See *Jones* v. *State*, 133 Miss. 684 (1923), and rules promulgated by the Commission of Circuit and Chancery Court Judges in 1922.

[49]*Mississippi Supreme Court Reports*, Vols. 142-53 (1926-28).

[50]*Webb* v. *Town of Sardis*, 143 Miss. 92 (1926).

[51]*Bates* v. *State*, 143 Miss. 772 (1926).

[52]For an excellent discussion of this subject, with special reference to its application in Mississippi, see an article by Justice George H. Ethridge entitled "The Law of Arrests" in 3 Mississippi Law Journal, 79-96 (1930).

not depend on the ordinary positive remedies for protection against such acts, then the courts must be branded as failures in dispensing justice. It seems that the legal remedy furnished by the state for the protection of those accused of crime, against the illegal acts of arresting officers are sufficient without having our august tribunals solemnly declaring that the perfectly obvious is not legally true.[53]

Another procedural problem which, judged by the number of cases in which it is cited as error on appeal or by the number of reversals resulting therefrom is of considerable consequence, is that of instructing the juries. In the circuit court the judge is required to instruct the juries on the law with written instructions. In actual practice the judge merely approves instructions made up by the opposing attorneys—where attorneys are used—which instructions are read to the jury and then given to it for use in its deliberations.[54] If an attorney submits an instruction which the judge refuses, the instruction becomes a part of the record without a bill of exceptions, and if the judge accepts an instruction from one attorney, the opposing attorney may object to it.

The method of instructing juries does not seem to have much to commend it. Opposing attorneys do the actual instructing, such as it is, each attempting to give instructions favorable to his side. The result is that the jury in a case, instead of being properly instructed upon the law, may in fact be utterly confused. Even the attorneys,

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[53]A former justice of the Mississippi Supreme Court, in speaking of some of the absurdities in the law and judicial practice of the state, had this to say: "The design of the criminal law is to protect society from those who set at defiance its rules of good conduct, but by a strict adherence to many of its useless shambles the purpose of the criminal law has been subverted and the violator of the law, and not society, receives the greatest protection.

" . . . If property rights were to be made to depend upon such farcical technicalities as is the life, the peace and tranquility of the citizen, such law would be torn up root and branch." E. B. Mayes, "Needed Constitutional Changes," *Reports of Mississippi State Bar Association,* IV, 71-85 at 74 (1909).

[54]The law positively prohibits the giving of an instruction by the judge unless it is requested by one of the parties. However, a judgment of the court may be nullified for failure to properly instruct the jury even though the "proper" instruction is not asked for by either side. Commenting on this absurd situation, R. N. Miller, a member of the State Bar, said, in part: "Notwithstanding we have a statute that prohibits the court from volunteering to give any instruction to the jury, a line of decisions has latterly existed in our state which predicates error of the court failing to give the jury, of its own motion, an instruction defining the jury's power with reference to the grade of offense, that is, in certain cases deemed by the court to be possible cases of manslaughter, and where the jury find for murder, it is held to be error not to have instructed the jury in reference to their power to find for manslaughter. . . . It has always appeared to me that it was difficult to predicate error on the court's failure to violate a positive statute prohibiting the voluntary giving by the court of charges not requested by counsel on either side." "Needed Reforms in the Criminal Law and Procedure in the State," *Reports of Mississippi State Bar Association,* IV, 89-103 at 96 (1909).

themselves, often do not seem to understand the significance of their own instructions.[55]

Besides slowing up the progress of the court, the present forms and rules of procedure in the circuit court (and other courts of the state), virtually compel parties to engage in obstructive tactics in order to preserve their legal rights. This means, too, that the person without competent legal aid is substantially deprived of his right to be heard on appeal. Whether the final judgment against a person will be "guilty" or "not guilty" depends all too often upon the quality of counsel (if any) he has on his side.

It is not contended here that the state should guarantee every person competent counsel, nor that the right to appeal should be broadened. But if the indigent are going to be compelled, directly or indirectly, to accept the decisions of the trial court as final, then the more financially able should be compelled to stand on the same ground in more cases. A court procedure which invites, or even requires, obstructive tactics is indeed open to criticism.[56] If the one who wins his case secures justice we might say, in general, "justice flows over the path of greatest resistance."[57]

Space does not permit an extended discussion of possible methods of improving the procedure in the circuit court, but we will briefly mention certain steps which would perhaps enable the court to function more efficiently than is now the case. First, the judge should be given a more dominant role in the court's work. In this regard he should be the main factor in the selection of jurors for each particular trial, in instructing juries, and in eliciting testimony from the witnesses. Second, law enforcement officers should be held more responsible for their illegal acts and alleged criminals should be given fewer benefits from the unlawful acts of peace officers. Third, the grounds for appeal should be restricted and the procedure on appeal simplified.

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[55]*Simms* v. *State,* 149 Miss. 171 (1928). In this case an attorney had objected to an instruction that was held to be actually favorable to his client's cause.

For an excellent critical discussion of the subject of instructing the jury the reader is referred to an article, "Instructions to Juries," by Professor R. J. Farley, 42 *Yale Law Journal,* 194 (1932). (Reprinted in 5 MISSISSIPPI LAW JOURNAL 203, 1933).

[56]In *Ellis* v. *State,* 142 Miss. 468 (1926), a new trial was granted because of an error in the drawing of the grand jury that returned the indictment; but in *Chandler* v. *State,* 143 Miss. 312 (1926), a new trial was denied, although the same grand jury returned both indictments. "Justice" in these cases seems to have depended on a timely objection by a lawyer, and not at all on the nature of the trials had.

[57]Upon one occasion the Supreme Court of Mississippi said: "The administration of justice is a preëminently practical thing; and too many reversals are occurring all over the land in criminal trials on technical grounds; and the su-

Reforms in Organization. Aside from the questions of diligence of the men in charge of the courts, and the rules of procedure in these courts, there remains the question of the organization of the courts with reference to the amount of business coming into the court of each district. In this matter the chancery and circuit courts will be taken together. The following table gives some interesting data with reference to the distribution of the judicial business in the various circuit court districts.[58]

District	Counties	Area	Days of Circuit Court Scheduled	Days of Circuit Court Held	Days Chancery Court Scheduled	Days Chancery Court Held
1	7	3,455	234	97	102	40
2	5	2,667	258	138	162	65
3	7	3,687	216	78	96	39
4	5	3,128	270	195	162	65
5	7	3,606	204	80	132	53
6	5	2,861	210	79	144	57
7	3	2,488	252	115	228	91
8	5	3,093	186	107	114	45
9	4	1,889	246	125*	108	43
10	4	2,897	240	150	90	39
11	4	2,222	246	158	138	55
12	3	1,802	252	189	90	36
13	4	2,278	192	92	96	39
14	4	2,141	204	108	114	45
15	5	2,649	216	190	102	41
16	5	3,036	210	86	102	41
17	5	2,690	264	90	96	39

*Estimated

From these statistics it will be seen that there is a considerable variation in the number of counties, area, and average number of days

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preme courts should not sit in the trial of cases as if in 'quest of error,' but rather with the purpose of administering between the state and the defendant exact and impartial justice, and affirm the results reached in the courts below where that result is plainly and manifestly right on the whole record; not reversing cases and subjecting counties to the expense of repeated new trials, and giving to defendants who ought to be punished all opportunities for continuance and the various means of escaping justice." *Gray* v. *State,* 90 Miss. 235 (1907). *Arthur* v. *State,* 147 Miss. 136 (1927); and *Vaughn* v. *State,* 143 Miss. 722 (1926) were two very similar cases. In the former the "proper obstructions" were put forward by the defendant's attorney and a new trial was secured; but in the latter these "obstructions" were missing and the defendant secured no redress on appeal.

[58]These data were secured from the following sources: *Report of the Joint Legislative Committee on Circuit Court Redistricting* submitted to the legislature in 1930; *Mississippi Code,* 1930, §§ 318 and 473; *Biennial Report of the Secretary of State* (Miss.) 1929-31, 224, and data secured through personal correspondence with the chancery clerks in a large number of counties. The "days of circuit court held" is the average annual number in each district for the four years 1925-28, inclusive. The "days of chancery court held" is estimated from the days scheduled and the information secured from the clerks in the several counties.

of circuit court held in each district. The seventh and twelfth districts have three counties each, whereas the first, third and fifth districts have seven counties each. The twelfth district, the least in area, has 1802 square miles while the third, the largest, has 3687 square miles. One might say that as a result of this latte rsituation a judge in a larger district has to travel around from county seat to county seat and has less time for holding court. The average number of days of circuit court held in these districts supports this idea; but the fourth district, a large one in area, has an average of 195 days of court each year whereas the small twelfth has only 189 and the third only seventy-eight. It is admitted that the amount of judicial business in a district may not necessarily correspond to the size of, the number of counties in, or the population of the district. But in a districting system in which one judge is required to work almost three times as much as his colleague in another district the arrangement is hard to justify.

Seven judges hold court less than one hundred days each, and five more than 150 days each. The average number of days of court held by the lowest eleven is eighty-seven, whereas the average number for the highest six is 170. Evidently, if the judges in the latter group of counties are not very much overworked, those in the former group have much leisure time at their disposal.

In each of thirteen districts it would be possible for the circuit judge to preside over the estimated number of days of chancery court held in the district, and yet not be holding court more days each year than does the circuit judge of the fourth district at present. It is true that some chancery judges transact much vacation business, and all transact some; but it is earnestly believed that if the state were properly redistricted it would perhaps be possible for the present number of circuit court judges to transact the business of both chancery and circuit courts without any judge having to work any more than several judges work as it is now.[59] To say the least, there does not seem to be any reason why the courts cannot be organized more efficiently.

The modern tendency in judicial reform seems to point toward simplicity and unity of organization, with provision for proper co-ordina-

[59]The Committee on Judicial Administration and Remedial Procedure, of the Mississippi State Bar Association, made the following significant recommendation in its report to the Association in 1928: "We believe that there are more judges and chancellors now in the state of Mississippi than are required for the transaction of the business coming before the courts. A number of them work comparatively little of the time; we believe that the interests of the public would be conserved by decreasing the number of chancellors from ten to six. . . . We think the circuit judges should be decreased from seventeen to ten." 1 MISSISSIPPI LAW JOURNAL, 77-8 (1928). Since this report was made, the number of circuit judges has remained at seventeen, and the number of chancery judges has actually been increased to eleven.

tion of functions and for supervision of the trial courts.[60] These reforms, it is believed, can be instituted in Mississippi without the necessity of elaborate constitutional changes, if not, indeed, without any constitutional changes at all. It has been previously suggested that there be only one inferior court in the state.[61] It is suggested here that only one court, or system of courts, of general unlimited trial jurisdiction is needed. A practical difficulty in bringing about such a system whereby two courts, circuit and chancery, now exist would seem to be that both these courts are provided for in the constitution and a change would necessitate amending the constitution. However, a simple plan will be proposed here whereby this seeming difficulty can be avoided.

The state could be districted into co-terminous circuit and chancery court districts. The offices of circuit and chancery judge could then be vested in one person in each district. This person would preside over both courts meeting simultaneously, or virtually so. In this way there would be in practice only one court in each district. No doubt the power of the legislature to make such a change would be questioned. However, at the present time the duties of the circuit clerk and the chancery clerk, two constitutional officers, are performed in each of certain counties by the same individual. The separate offices still exist in these counties, though only single "officers" exist.[62] It seems logical that the same method might be used for bringing about a virtual combination of the circuit and chancery courts.[63]

In view of section 147 of the Constitution discussed above, the jurisdiction and procedure in the two nominally separate courts under such a system as is proposed, could be almost completely merged so as to avoid the evils resulting from separate courts of law and chancery. Only one court clerk would then be necessary in the counties having two such officers at present. And further, with provision for the temporary transfer of judges by the Supreme Court, or the chief justice of that court, and for other forms of supervision of the work of these

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[60]See especially, 16 *Journal of the American Judicature Society,* 79-83 (1932). The purpose of this journal is "to promote the efficient administration of justice," and no better source of information on what is being done in the United States toward judicial reform can be cited.

[61]See the previous installment. 6 Mississippi Law Journal, 109, at 127 ff (December, 1933, number).

[62]*Mississippi Code,* 1930, § 2918, permits the board of supervisors in any county with less than 15,000 people to consolidate the duties of the two offices. In five counties consolidations appear to have been made.

[63]The writer favors this roundabout method of reform only for reasons of expediency. A new constitution or a complete revision of the judiciary article in the present one would perhaps be the best plan, in theory at least, but as a practical proposition reforms through legislation may be more hopefully contemplated.

trial judges by the Supreme Court, the state would possess a truly unified judiciary.

With the increased functions placed upon the circuit judges as suggested in the study of the inferior courts, and with the placing of the common law and chancery business in the hands of one judge in each district, it will be necessary, perhaps, to increase the number of districts (above the seventeen circuit court districts). In a few counties, Hinds, Warren and Lauderdale, for example, it may be necessary to have a single county as one court district. There are at present a total of forty-two circuit, chancery and county court judges. It is believed it will not be necessary to have more than twenty-five to perform the functions performed by these forty-two even with the additional supervisory functions suggested for these judges.

Some advantages that might be expected to accrue from such a reform as is proposed here would be as follows: First, a great deal of money would be saved. The number of judges would be cut almost in half, as also would the number of court stenographers. By combining the offices of circuit and chancery clerk additional money would doubtless be saved. The over-head expense of court terms would probably be considerably less. Second, each county could easily have a term of court (for law and chancery matters) at least quarterly, instead of semi-annually as is now the general practice. In the smaller counties at least two of these could ordinarily be non-jury terms and could thus be made very inexpensive. Under the present arrangements there are actually at least four terms of court, ordinarily, each year in every county; but since two are circuit court terms and two chancery, so far as the parties are concerned the terms are six months apart. Third, the evils connected with separate courts of law and chancery would be virtually obviated. And finally, the judicial system would be simplified to a marked degree.

On the whole, the writer believes the facts justify the proposals made above. However, details would have to be worked out in the light of a closer study of the actual conditions. A special legislative commission or a judicial council could draft a bill for bringing about the improvements contemplated here. Since improvement in judicial administration is a continuing process, a permanent body, such as a judicial council, should be created to make a continuous study of the system as a whole and to offer suggestions from time to time for improving it.

MISSISSIPPI—STORM CENTER OF SECESSION (1856-61)

PERCY LEE RAINWATER†

III

THE CANVASS FOR DELEGATES TO THE CONVENTION OF 1861*

The candidates to the Convention of 1861 were not nominated upon platforms pledging them to specific courses of action. So far as the resolutions passed by primary conventions in the counties disclose, no county except that of Green instructed its nominee to vote for "immediate secession from the Federal Union."[1] The practice generally followed by county meetings, whether leaning towards Southern co-operation or separate State secession, was not to lay down an undeviating line which might hamper the delegate's course of action at the Convention but to leave him free to exercise a discretion or right of judgment.[2] The popular vote, therefore, for delegates to the Convention of 1861 was a mandate neither for separate State secession nor for Southern co-operation; but rather a vote of confidence in the delegates who, the mass of the voters believed, would take counsel together and act for the best interest of Mississippi and the South.

As might have been expected, however, each primary meeting nominated its county's quota for the Convention from among those of its citizenry whose views with reference to the remedy for the present crisis corresponded with the resolutions and resolves of the meeting. In thirty-four of the sixty counties in the State, candidates for the Convention made the canvass upon the issue of Southern Co-operation vs. Separate State Secession. The term, "Southern Co-operation," was not uniformly interpreted in all the thirty-four counties. To some the term meant co-operation of all the slave-holding States WITHIN the Union to compel the non-slaveholding States to grant to the Southern section its rights under the Constitution, failing which

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[1]The Green County Convention, *Eastern Clarion,* December 19, 1860.

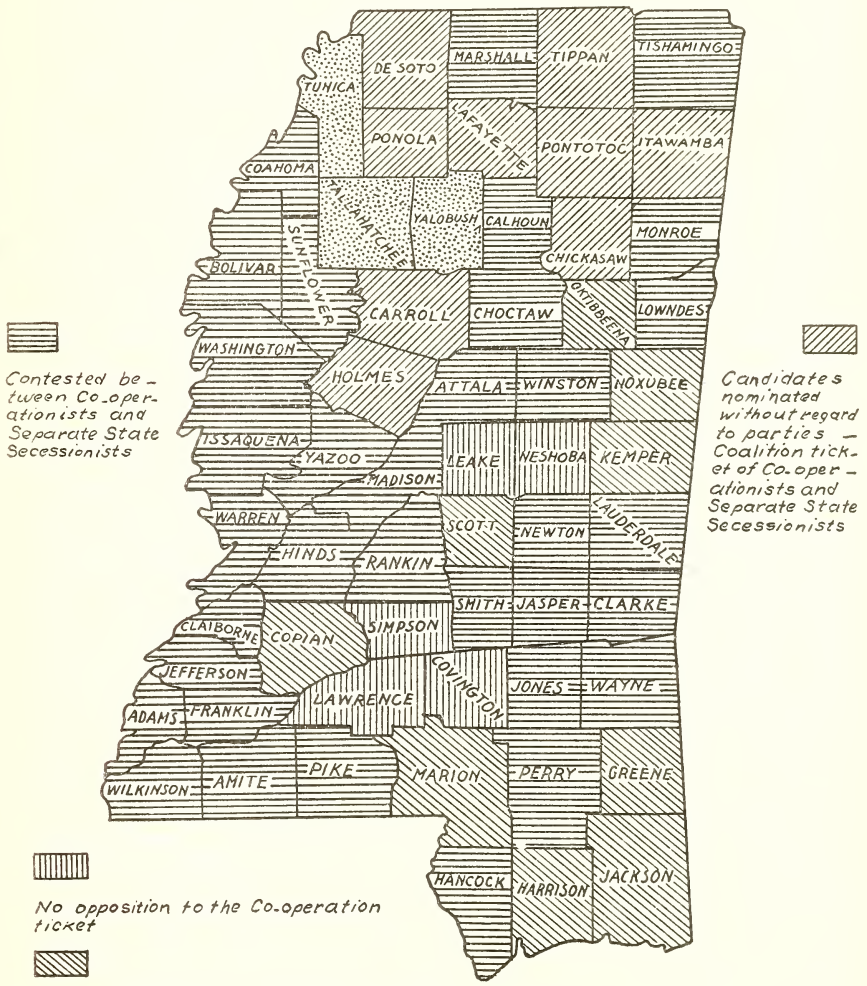
[2]MS. Wiley P. Harris, Autobiography. "The Policy of Secession," Speech of A. C. Holt at Woodville, Dec. 10, 1860. See accounts of courty meetings in *Natchez Courier,* Dec. 5, 8, 11, 13, 18, 19, 20, and 23, 1860; *Memphis Appeal,* Dec. 7, 13, and 14, 1860; *Eastern Clarion,* Dec. 5, 12, and 19, 1860; and the *Vicksburg Whig,* Dec. 12, 13, 15, and 18, 1860.

all the slaveholding States, in concert, would stage a revolution, throw off the shackles of the Union, and form a Southern Confederacy. A minority of the Co-operationists, however, while opposing the secession of Mississippi irrespective of the position taken by the other Gulf States, were unwilling for Mississippi to refuse to take part in the disruption of the Union until the border States could be persuaded to co-operate with the planting or Gulf States. In other words, the mild Co-operationist, failing to secure from the North adequate and satisfactory guarantees for the equality of the States and for the protection of the institution of slavery, was willing to hazard all to the throes of revolution provided the Gulf States only would participate in such a course. All Co-operationists in Mississippi stood on the common ground of being unwilling to disrupt the Union merely because of Lincoln's election and before all remedies WITHIN the Union had been applied and found to be insufficient; and all alike were opposed to precipitating the South into revolution by the separate secession of each State. Standing upon this common ground, Co-operation candidates in thirty-four counties opposed candidates who were for immediate and separate secession of Mississippi and for co-operation with other Southern States after that secession had taken place. In certain other counties, nine in number, nominations to the Convention were made without respect to parties, as for instance, when James Z. George and L. Q. C. Lamar, both of whom were ardent separate State Secessionists, were placed on the tickets in the counties of Carroll and Lafayette, respectively, with William Booth and T. D. Isom, both of whom were mild Co-operationists. These coalition tickets were efforts at the unity of all groups on the great principle of Southern interest, but they did not in all cases attain their objectives. In a few cases, extreme Co-operationists nominated an opposing ticket, but never with any appreciable success. This was the case, for instance, in Lafayette county, where the coalition candidates, Lamar and Isom, were opposed by D. Robinson and J. S. Buford. In three of the counties the co-operation ticket had no opposition, while the separate State secession ticket was unopposed in nine counties.[3]

To give the main lines of argument employed by the candidates for the Convention of 1861, is considered very germane to the story of secession in Mississippi. The Co-operationists following, in the main, the resolutions of the Union mass meeting at Vicksburg on November

[3]The sources upon which are based the data with reference to the position of candidates for the Convention of 1861 are widely scattered and cannot be cited specifically for each of the six counties. In the main, the *Natchez Courier,* the *Vicksburg Whig,* the *Eastern Clarion,* and the *Mississipppian* for December, 1860, furnish the data upon which conclusions on this point rely.

POSITION OF MISSISSIPPI COUNTIES IN THE CANVASS FOR DELEGATES TO THE CONVENTION OF 1861



29th, maintained that the election of Lincoln, though in accordance with the forms of law was a violation of the spirit of the Constitution. Wherein did this violation of the spirit of the Constitution in the election of a President constitute an aggression on, and a menace to, the South? The aggression, it was maintained, rose above and beyond mere annoyances, obstructions of law, unkind words, and the triumph of certain principles of which the South disapproved, and struck at the very heart of the Constitution; namely, the equality of States, a question in which Rhode Island should be as much interested as Mississippi. The real question involved was, therefore, whether certain States, large or small, could combine and conspire together for any purpose whatever to obtain possession of the government, and thus lord it, under the Constitution, over the other States. Such an issue confronted the South in the Election of Lincoln, the avowed sectional candidate of eighteen nonslaveholding States which had combined and conspired to get control of the government in order to control the institutions of fifteen slaveholding States. The principle of majority rule did not apply to the situation because Lincoln was not elected by the people of the United States but by the people of seventeen States combined against the institutions of fifteen States. The conservative people of the North, it was declared, though having, many of them, strong prejudices against the institutions of the South, stood also upon the great principle that States ought not to combine against States, their equals in the Union, nor section against section. The position of the Co-operationist was, therefore, the truly national position which he had refused to abandon when the South nominated a sectional ticket for President and which he would continue, he declared, to support in the present crisis.[4]

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[4]The sources for the arguments employed by the Co-operationists in the canvass are as follows:

(a) "An Appeal to Thinking Men," by Josiah Winchester, a member of the Convention of 1861 from Adams county, being a series of articles appearing in the *Natchez Courier* from November 17 to 24, 1860, arguing that the South should exhaust WITHIN the Union all its Constitutional remedies for a redress of its grievances before resorting to right them by revolution. These collected articles appear in the *New Orleans Picayune* for December 19, 1860, with an explanatory note by Jacob Barker, as follows: "To the Editors of the Picayune: Gentlemen—My opinions on the unfortunate, uncalled for, and calamitous state of public affairs, correspond so exactly with those expressed in the accompanied articles, from the Natchez (Miss.) Daily Courier, that I think I cannot do my fellow-citizens better service, on this the 81st anniversary of my birth, than by having it republished." For proof that these articles were written by Josiah Winchester, see the *Natchez Free Trader,* Dec. 19, 1860, and *The Life of Walter Quintin Gresham,* by Matilda Gresham, Vol. I, p. 251.

(b) "Secession Tracts for the Times" and "Squibs by Junius," appearing in the *Vicksburg Whig* from December 7 to December 29, 1860, are very able presentations of the Co-operationist's arguments. Co-operation candidates and

The advocates of Southern Co-operation contended for every right of the South under the Constitution. They did not propose to yield any rights by further concession in the Union, or, by secession from the Union, abandon those which the Constitution guaranteed to each State and to every citizen. "Secession," the Co-operationists argued, "is submission and abandonment of our rights." The very term itself was "a hypocritical, cowardly word used to deceive patriots into treason." The South had rights under the Constitution and the Union, and

> shall we secede and abandon them; or shall we maintain them? . . . Our fathers gave us a goodly heritage rich in present blessings, and all glorious with the golden promise of yet richer fruition in the years to come. And now, when some of the heirs attempt to mismanage the grand plantation, shall we, who are equal heirs, "secede," and leave the whole inheritance to them, . . . Shall we abandon all? . . . Shall we give up all without an effort? Shall we not rather demand a full performance of the covenants of the Constitution? Shall we compel "Abe" to enforce the laws, or shall we flee into Egypt?

The idea of secession advocated by the "fire-eating," "chivalric" Governor, "the Scripture-quoting Pettus," was "equaled in its cowardice only by its extreme silliness." The idea that the South, nine millions strong, could not take the time to form its plan deliberately and to do right deliberately but instead must, like a poor helpless baby, "fly from the Herod of Abolition, run out of the Union, and hide from its ferocious enemy," could have emanated only from the brains of "dissatisfied, self-conceited, ambitious, selfish, fussy, cowardly men possessing only sprightliness, imprudence, and a selfish recklessness and courage in the absence of danger." Although the sight of an Abolitionist would terrify a county of these "brave men," they were unashamed of their cowardice and worked assiduously to propagate the panic which " 'a decent respect for the opinion of mankind' would cause them to conceal within their own bosoms." The special message of Governor Pettus to the Legislature, in which he recommended secession, furnished, then, an unusually good mark for the shafts of those who wanted to fight the battles of the South from within the Union. This point is further illustrated by a playlet in one of the "Secession Squibs—by Junius." The scene of the playlet

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Resolutions of county conventions made wide use of the argument found in all these articles. See, for instance, the speeches of Walker Brooke and T. A. Marshall, Co-operation candidates from Warren county, in the *Vicksburg Whig* for December 14, 1860; the speech of Josiah Winchester, *Natchez Courier,* December 20, 1860; and especially the Resolutions passed by the Co-operationists of Madison county in the *Vicksburg Whig* for December 14, 1860.

was laid in a lunatic asylum; and the characters were the Superintendent of the asylum, Governor Pettus and Junius:

> JUNIUS: Mr. Superintendent, permit me to introduce you to Governor Pettus. (*Aside*) He is the representative of a large party who should become acquainted with you. You will find him a very pleasant gentleman, and on many subjects he will talk sensibly. If, however, you ever begin to doubt his insanity, whisper the word "Abolition," and you will see his knees tremble, the color leave his cheeks, his eye-balls start, his whole countenance become distorted with fear. He will halloo to the politicians to run "down into Egypt" with the young child,—the little South,—and tell you of his silly plan of DISUNITING, in order to REUNITE "the South."
>
> Should you still doubt, allude to the fact of his being frightened and you will find that whilst shivering with fear, he regards his party as the courageous party and himself as an heroic leader; and that he sincerely believes his RUNNING party to be the only one capable of intimidating the Abolitionists; and that all Southern men, who do not fear and tremble as he does, who do not think nine millions of free white people are a LITTLE CHILD to be protected by running with it down into Egypt; or that these States should be DISUNITED in order to be "REUNITED," are cowards, traitors, or fools.
>
> SUPERINTENDENT: You say the Governor is the representative of a large party. You mean a party of voters?
>
> JUNIUS: Yes. This is epidemic. It is raging among three classes of the people. The old who are in, or approaching, their dotage; young adult males, who are ignorant and green, or self-conceited; and the political or irreligious persons. It is beginning to spread among the modest and sensible, and seems instantly to dwarf or craze the most powerful intellect.
>
> SUPERINTENDENT: Then, oh my God! Our country is lost![5]

Not only was secession according to the Co-operationists, a cowardly policy which abandoned without a fight many and valuable vested rights of the South in the Union, but its consummation and the formation of a "Cotton Republic" composed of the Gulf or planting States would be the grossest injustice to the border States and would ultimately bring about the extinction of slavery itself. In the border States

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[5] *Vicksburg Whig*, December 20, 1860.

MS. B. L. C. Wailes' Diary for January 1, 1861, says: "Mr. Robert Rose, who has made a fortune in and around Natchez where he has lived for twenty years or more as a master mechanic and who is worth not less than $150,000 is on Board [the General Quitman] in charge of his son and a few friends who are taking him to the Lunatic Asylum at Jackson, having been deranged by the present political excitement and imagines himself ruined and poor. He is a worthy industrious sober man and much esteemed. From present indications in the political arena, there are thousands among the disunionists more mad than he."

the evils of Abolition, it was pointed out, were realities; whereas in the Cotton States they were mere abstractions. The more reasonable policy therefore, was for the border States, if intolerably aggrieved, to initiate aggressive movements and appeal to the Cotton States for endorsement and assistance. To such an appeal "real chivalry" would respond with strong arms and hearts. Only a "fictitious chivalry," rash without discretion and courageous only in words, could propose to reverse the plan and set themselves up as judges as to what, and how much, their co-equals should suffer before resorting to revolution. That the people of the border States were less sensitive to honor or less brave than the people of Mississippi, "the repudiating State," or the people of South Carolina, "the nullifying and 'backing down' State," was a pretense, "which only brings out in bolder relief the hideous blots upon their unenviable escutcheons." The secession of the Cotton States, it was argued, constituted a "base and cowardly desertion" of the northern tier of slave States which had, with the planting States, a common interest in the institution of slavery. Every dictate of honor and justice, therefore, demanded that the border States should not be abandoned until they had, at least, been consulted and had refused to co-operate and agree upon a plan of resistance for the protection of the common interests of all the slaveholding States.

But the dictates of policy and self-interest likewise demanded that the northern and southern tiers of slave States should co-operate for the protection of the institution of slavery. For the Cotton States to act independent of, or to desert the border States, would "divide the friends of slavery;" finally abolitionize the deserted States; confine slavery to a very restricted region; and leave it, as Seward desired, "to sting itself to death." The formation of a "Cotton Republic" since the number of slave States in the United States would be thereby diminished, would lead to the constitutional abolition of slavery in the deserted slave States. If abolition were not thus accomplished, the same objective could be speedily effected by slave-stealing on the northern border and slave-selling on the southern border, or by the emigration of slave owners who could or would not sell their slaves. In any event, the slave border would recede gradually southward even to the very borders of Mississippi. The "Cotton Republic," even if able to maintain itself—and that was denied by the Co-operationists—would be too weak to conquer territory to the Southward into which slavery might expand. Slavery would thus be confined and hemmed in to fixed limits where natural increase of slaves would soon effect the object sought by such men as Greeley and Seward. Caught between the two

millstones of inability to expand and the natural increase of its slaves, the boasted "Cotton Republic" would find its slave labor "comparatively worthless."

Furthermore, said the Co-operationist, the secession of the individual planting States and the formation of a "Cotton Republic" could not be achieved without civil war and revolution—"the most prolonged, extensive, and horrible ever recorded in Time's bloody volume." The people should not permit themselves to be deceived by any such "hypocritical nonsense and misnomers as peaceable secession." They should not be deceived by any such "false calculations" or "intoxicated by any such foolish hopes." The only possibility, ran the Co-operation argument, for a bloodles revolution lay in the united and concerted withdrawal of all the slaveholding States from the Federal Union. Such a united South might be strong enough to "insure a peaceable result" and force a "fair division of the territories, the navy and the public property." Such action would, however, be revolution pure and simple and was not justified by existing conditions. As for the plan or remedy recommended by Pettus and his followers, it was not a remedy at all:

> It would weaken slavery, confine, and ultimately destroy it; would but aggravate tenfold our present grievances—shut us out forever from the occupation of new territories, and increase the number of fugitive slaves. It would crush us with a load of taxes, reduce the value of our property, impoverish our people, and involve us in bankruptcy and war.

What, then, did the Co-operationists propose as a remedy for the existing evil? In the first place, the Co-operationists proposed to employ all the remedies which the form of the Constitution afforded to checkmate Lincoln in the attempted pursuance of any other course than a purely national one. The legitimate checks of the Constitution were pointed out as being entirely adequate, for the present, to enable the slaveholding States to keep a "full and perfect control of the sectional madness of the day" and to bring about, if necessary, a complete stalemate in the government. "These checks," said Josiah Winchester, "are remedies within the Union, and under the Constitution." "Let the government pause, but not be destroyed; let its function be suspended, but not extinguished; let the flame grow dim, but not be altogether quenched!" The remedies thus prepared by the Founding Fathers for just such an emergency would, it was believed, be quite sufficient to compel Lincoln to abandon, at least temporarily, the sectional position of his party. In the meantime, argued the Co-operationist,

a convention of all the States can be called; not a sectional but a national body. There the rightful demands of the South can be presented; there the fifteen States can tell their eighteen sisters that under the Constitution the latter have no right to combine, and will not be allowed to combine, against them; that the combination, while it lasts, will be resisted, within the Union and under the Constitution, by every means the latter allows. They can tell them that it is not the man, Lincoln, they fear, but the principle, combination to aggress, which they resist; that government must and shall stop unless the President acts nationally; that if the combination goes further, and obtains possession of the legislative department as well as of the executive, then, the present Constitution having proved inefficient to protect the principle of equality among the States, new guarantees must be yielded by the North, or the compact of Union must be dissolved by joint consent.

If the free States continued to combine as a section against the South and refused either to give new guarantees for the further and adequate protection of the slaveholding States or, having refused further guarantees, to consent to a dissolution of the Union upon terms of an equitable division of the public property, then the Co-operationists were for plunging into the "angry waters of revolution." In such an eventuality the slaveholding States would be united and might reasonably expect to succeed in founding and maintaining an independent Southern Republic. But viewed, even, in this favorable light, disunion was little more than cutting off "our nose to spite our face" or of committing "suicide for fear we shall die a natural death;" because:

Let fifteen Southern States unite in forming a Southern Confederacy! Will Delaware, Maryland, Virginia, Kentucky, or Missouri grant us of the "cotton States" a representation for three-fifths of our negroes? Will the interests of Baltimore, Richmond, Louisville, St. Louis, or Memphis, be identical with ours? Will the rule that Charleston will impose, either for foreign commerce or for domestic relations, be that which the Southwest will relish? How long will mutuality of interest in one species of property, keep together those who are dissimilated with respect to all other species? When Charleston demands free trade and New Orleans a duty on sugar; and Kentucky and Missouri a duty on iron or hemp; when Louisiana, Mississippi and Missouri are taught to feel that theirs are democratic States and South Carolina an oligarchial one . . . how long will the Southern Confederacy last? The newly confederated South will soon become dissatisfied. The Northern tier of States will find their interests diverse from those of the Southern tier. The former will become the Northern States of the New Confederacy. The passions of the hour will soon

> pass away, and self-interest will dictate political action . . . and what will be the final result? Another split and a new secession![6]

The advocates of separate State secession recited in their arguments the long list of aggressions made by the free States upon the interests of the slave States and of the avowed intentions of the free States to continue such aggressions; how further efforts at compromise were futile and would result only in further humiliation of the South before an arrogant North; and of how the North, by getting control of the government in a manner and for a purpose contrary to the spirit of the Constitution, had already destroyed the Union of the Fathers, which was but the "casket they made to protect the priceless jewel of the right of self government" from destruction. Frequent allusions were made to that "immortal Revolutionary Band" who, though "insignificant in numbers, without a navy—almost destitute of arms and ammunition, with no money, no credit, no resources—threw off the rule of the most warlike, and powerful nation of the earth." The leaders of secession in 1860 were cast in the roles of "John Hancock and his Colleagues in 1776," who in the latter day were called upon

> to rescue from the polluting touch of sacrilegious hands that for which our Grandfathers starved and froze and fought and died; and, by the hallowed memories of our sires, to SCOURGE OUT from the temple of liberty, erected by their toil and consecrated by their hearts' best blood, the THIEVES and money changers who have crept into it and would defile it by their unholy deeds![7]

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[6]Josiah Winchester,—"An Appeal to Thinking Men," *Natchez Courier,* November 24, 1860.

MS. Oscar J. E. Stuart to John J. Crittenden, Summit, Mississippi, January 7, 1861, Crittenden Papers, Vol. 24, pp. 4967-4968, describing himself as an "old National Intelligencer reader, Henry Clay-Daniel Webster Whig, and a Virginian by birth," said: "I am confident that the leading politicians of the cotton States do not at all desire to include Delaware, Maryland, Virginia, Kentucky, Missouri, N. Carolina or even Tennessee in the proposed Southern Confederacy. Those States named would all be in favor of collecting duties by imposts, and thwart their idolized policy of free trade. Hence the precipitation of all the cotton States by separate State Action. They [the cotton States] will have a convention in advance of the border States, form a free trade constitution, and you may, if you will, then join us, but in doing so you must renounce your ideas of a protective tariff—at least for a while. The term of the Executive will be a long one, at least 10 years. You [the border States] might be troublesome in thwarting the cherished policy of the savants of the free trade school, and hence it would be more convenient to have you [border States] as a bulwark of defence, than a 'part and parcel of ourselves.' Your numerical superiority would not only enable you to shape the policy of the Confederacy but you could elect the President, and defeat not only John Slidell, but any of the pinks of chivalry of South Carolina. I do not think our Senator, Col. Davis, entertains this view of the subject. I regard him as a gentleman of considerable dignity of mind, a true patriot, and proud of his native State, Kentucky, as she has a just right to be proud of him. *He is a gentleman of more enlarged views and free from the ignoble selfishness which forms a large ingredient portion of the characters of many others.*"

[7]There is only one verbatim copy, so far as is known, of any speech made by any candidate during his canvass for the Convention of 1861. The complete

The advocates of secession, unlike the "political Idolators" who persisted in worshiping at the shrine of the Union long after the God-like principle breathed into it by the Founding Fathers had taken flight, determined to set up a Confederacy of the cotton growing States which would have in its keeping the "Constitution of our Fathers unmutilated." Each of the cotton States having resumed its sovereignty and a provisional government for the "Cotton Republic" having been set up, the Congress of the new Confederacy would set forth to a candid world a list of grievances, with which the Declaration of Independence had nothing to compare, which had impelled the States to the separation. The motto upon the flag of the new Republic would be "room for more." The new state would gladly receive into its communion each and every State which would "purify itself of the stain of Abolitionism." Both friends and foes were welcome, but the latter "with 'bloody hands to hospitable graves'."

The first result of this modified form of the "fleeing-into-Egypt" idea of Governor Pettus, would be that the border States, unwilling at first to initiate such a movement or even to follow along with the planting States, would cast in their lots with the new Republic, which should immediately assist them in "expelling forever" from their midst the enemy, Abolition. Working from this initial success against Abolition, the crusade would be carried into the Northern States themselves, and ultimately with entire success, "so that they too will in time have a right to knock for admittance, and thus once more to reunite this whole Confederacy in the bonds of genuine brotherhood and kind feeling."

The Secessionist denied the contention of the Co-operationist that the border States were equally interested with the planting States in the institution of slavery. Holt pointed out that many of these States were stock-raising and grain-growing States and that slave labor was not to them a primary necessity; that these States could continue to be

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address, cited above, made at Woodville, December 10, 1860, by A. C. Holt, the secession candidate of Wilkinson county, contains, it is believed, the typical appeal for separate State secession and the formation of a "Cotton Republic." The speech contains some 7000 words and is, of course, too long to be quoted in full. Holt's main lines of argument will be followed as representing the secession argument generally. Other sources stressing points similar to those made by Holt will be cited to show the prevalence of his viewpoint. Holt was of the planter type, being the owner in 1860 of many slaves. His Co-operationist opponent, Jones S. Hamilton, the Sheriff of the County, owned no slaves in 1860. Holt defeated his opponent 334 to 306 votes. Generally speaking, the towns cast a higher percentage of their votes for secession than did the precincts in the rural districts. See *Natchez Courier,* December 13 and December 22, 1860; *Natchez Free Trader,* December 25, 1860. Also, *Records of the Secretary of State,* Series F, Volume 83, Returns of the Election of Delegates to the Secession Convention, and the Mississippi Slave Schedule, 1860.

prosperous even if they sold all their slaves; that Abolitionism was openly tolerated in most of them; and that the cotton States should not, therefore, permit themselves to be hampered by making action in any wise dependent upon the wishes of the border States. Those who advocated separate State secession in Mississippi did not really desire the co-operation of the border States until after the Gulf States had formed a Confederacy. The efforts of the Co-operationists to inveigle the Gulf States into a conference or convention with the border States was but a scheme for defeating disunion.[8]

Neither could equality for the South in the Union be secured by any such "mad scheme" as that proposed by the Co-operationists, whereby Lincoln would be permitted "to sit in the White House, read the papers, draw his salary, and be a laughing stock to the South," through the use of the legitimate checks of the Constitution. Such a plan, the secessionist alleged, would settle nothing and would lead ultimately to bloodshed and civil war.[9]

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[8]*The Natchez Free Trader,* December 28, 1860, says: "The project of co-operation is but another name for compromise, for submission. . . . They [the Co-operationists] think that what is called the 'conservative sentiment' of the border States will bear down the other Southern States that are determined to have their plain political rights and liberties. They believe that if the Gulf States can be entrapped into a Conference, they will feel themselves in honor bound to abide by the result, and that will be *submission.* It is a scheme to dragoon the Gulf States into a conventicle where they will be overslaughtered by the numerical power of the others, and forced to acquiesce in thir decision." In like tenor, see *Natchez Free Trader,* Dec. 22 and 25, 1860; *Vicksburg Sun,* Dec. 10 and 24, 1860; *Eastern Clarion,* Dec. 5, 1860.

O. R. Singleton to J. J. Shannon, Washington City, Dec. 11, 1860, in *Eastern Clarion,* Dec. 26, 1860, says: "How stand matters in Mississippi? No misgivings I trust are felt by our stout hearted people. The steam is up, our baggage is checked through to secession, the cars are under way, and I hope that no 'Union saver' or 'Co-operationist' will be allowed to switch it off on to some little side track. Our rights, our honor, are now in our keeping, and we may make the South respected. But if we falter in our movements, or palter about terms, till the fires burn down, till our ardor is dampened, our sensibilities blunted, we will then be prepared to surrender at discretion, and to exclaim 'farewell,' a long farewell to all our greatness!"

MS. F. M. Aldridge to John J. Crittenden, Jackson, Miss., Dec. 31, 1860, writes to deplore that "We who have followed you as the leader of a great conservative party . . . now grope in the dark and know not whither we are drifting." Aldridge, who was a Co-operationist from Yalobusha county and member-elect to the Convention, saw no hope of preventing secession. "Kentucky," he said, "is not now ready to leave the Union and unite with a Southern Confederacy or a Confederacy of such of the slave States as feel impelled by their safety to take this step. . . . Would it not be to the interest of the border slave States that the more Southern slave States should first go out of the Union, so that the border slave States, when they should disconnect themselves from the present Confederacy, could attach themselves to a government already established? . . . We [the people of Mississippi] fear delay will produce indecision and our only hope is now settling this question. If we fail we will be treated as a subjugated race, too tamed to resent injury." Crittenden Papers, Vol. 24, pp. 4888-4889.

[9]In addition to Holt's argument on this point, see also that of Henry T. Ellett, secession candidate of Claiborne county, in *Natchez Free Trader,* December 12, 1860.

Likewise, the Secessionist looked for none of the dire consequences which the Co-operationist predicted would follow disunion. On this point, A. C. Holt, in his Woodville speech, said:

> I have seen a startling list made out—civil war-burdensome taxation—and depreciation in the value of property.
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> Let us see if there is not some imagination at work in this array of disasters as to any effort on the part of the Abolitionists to force us back by armed invasion. I might content myself by a reference to their own acknowledged presents that it will not be attempted. Greeley, the blackest of the lot, says that he does not favor a Union pinned together by bayonets.
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> They well know that such a step would be utter ruin to themselves. It would cut off forever all hope of reunion. It would involve the loss of Southern custom for their manufactories, the loss of Southern carrying trade for their shipping, the loss of Southern cotton for their factories. Then follows as a consequence tens of thousands of their laborers thrown out of work, their shipping idle, their spindles quiet, and quick upon this the awful cry in their midst for bread or blood. But this is not all. They know that England could not unconcernedly see the cotton fields of the South made barren, if indeed they would have the power to render them so. England has five millions of people depending in a great measure for their daily bread upon a REGULAR supply from the cotton fields.
>
> Besides this they know that the South pays nearly fifty millions on Northern manufactures, which we could save by free trade with England.[10]
>
> And to secure this free trade with us, and a regular supply of cotton, giving her the preference in case of short crops, these men know that England's navy would blockade every Northern port, if we required it.
>
> This is the loss account, how stand the profits? Would there be ANY in whipping us? I doubt it. The cotton growing States can equip and keep in the field 400,000 men trained from child-

[10]MS B. B. Trousdale to Andrew Johnson, Corinth, Miss., December 17, 1860, says: ". . . Candor compels me to say to you that the majority of the people in the cotton growing States seem to have calmly come to the conclusion that it is the duty which they owe to themselves and their posterity to sunder all political connection with the people of the non-slaveholding States. The people of the cotton growing States believe that the people of the free States are the greatest enemies that they have on the face of the earth, instead of being as they should be their best friends. The people believe also that by sundering all political connection with the Northern States that it would produce a state of prosperity in the planting States surpassing anything that has ever occurred by keeping out of the country millions of dollars worth of goods which is continually being sent here by the Northern States duty free and inducing the people to spend all their surplus earnings for goods instead of laying out their earnings in useful and substantial improvements. Such opinions as these stated above honestly entertained, and for good reasons, you can see how difficult a task it will be to induce the people of the cotton growing States to consent to remain in the present confederacy of States." Johnson Papers, Vol. 2, p. 313.

hood, to the use of the horse and the rifle and make not a bale of cotton or a hogshead of sugar less. They know this, and they would ask can we conquer these men fighting on their own soil, in defence of their homes, their wives, and their little ones?[11]

But admit for the sake of argument that they have conquered the Southern States, what will they do with them? Keep up standing armies and hold them as subjected provinces? Could they thus hold the one little State of South Carolina, the LAND of HAYNE AND SUMPTER, of MOULTRIE and MARION—the land whose heroes fought the battles of the revolution with shot guns and scythe blades, while they lived in their own dark swamps, with the tangled thicket their only shelter, their food, roots and cold water!

And the same causes which would bar an invasion, would operate to prevent border troubles and would force them to give us an efficient treaty for the rendition of fugitives, and for the adjustment of all disputed points.

With regard to the depreciation in the value of property, it need only be said, that the Abolition program carried only a little farther than it has been, and the question will be, whether there is anything left us to depreciate. BUT WITH OUR RIGHTS

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[11]A very few only of the secession leaders believed that war would result from disunion. The masses seemed to have confided in their leaders that secession would be peaceable. See letter of John D. Freeman to D. C. Glenn, Wiley P. Harris and others, December 10, 1860, in the *Mississippian,* Dec. 19, 1860. See editorial in the *Mississippian,* Nov. 14 and 15 and 21, 1860; the *Vicksburg Sun,* Dec. 3, 1860; the *Natchez Free Trader,* Dec. 15, 1860.

The *Eastern Clarion,* April 12, 1861, ridiculed the idea of war and predicted that if war came at all it would be confined to the borders and that while "Lincoln [who would be a fugitive] was testing the loyalty of the people of Texas and Louisiana to the Confederate States, we should test the loyalty to the United States of the people of New York city. . . . While his few hundred men were dying of black vomit at the mouth of the Mississippi or the Southern coast of Texas, our troops would luxuriate in cool Northern breezes . . . in no aspect of the case, have we the least cause of alarm. Our women, like those of Lacedaemon, will never see the face of a foe, for the war, let it rage ever so bitterly, will be far distant from our firesides."

" . . . It was that word 'peaceable' secession," said Payton of Copiah county, "that took with the masses of the people; and if they had supposed that our separation was to be followed by war, there would not have been a corporal's guard to have voted for it, but they were made to believe that it was a legal, Constitutional right, and were delighted at being freed from 'Yankees'." *Proceedings of the Constitutional Convention,* 1865, p. 205. Hall of Covington county said: "In 1861 my constituents were all secessionists—made so by the politicians, who told them that secession was to be peaceable." *Ibid.*

See also speech of William T. Martin of Adams county, *Ibid.,* pp. 198-199.

MS. "I know personally," said Wiley P. Harris, "that Col. Davis believed that from the beginning that war was inevitable. In a conversation with him before the meeting of the Congress at Montgomery, he expressed this opinion and regretted that Col. Johnson (Albert S.) was not free to commence the organization of an army in the plan of defense. He held a high opinion of General Lee, but feared that he would not enter upon these projects, though he might not remain in the Federal Army." See Autobiography.

MS. For like views expressed by Jefferson Davis himself, see Miscellaneous papers in the Private Papers of Jefferson Davis, in Confederate Memorial Hall, New Orleans, Louisiana.

FULLY GUARANTEED FOR ALL TIME, AS THEY WOULD BE UNDER A SOUTHERN CONFEDERACY, there is no safer or better investment than land and negroes. That there is now a derangement in financial matters in New Orleans proves nothing. It is but the result of the fact that our trade pays tribute to the North, direct trade with Europe would have prevented its occurrence.

The same state of things existed in 57, from precisely the same cause. Negroes MAY BE temporarily lowered in price, but you need not sell yours, and if you wish to buy from abroad, it is no hardship to get them for a few hundred less than you have been paying.

Of one thing rest assured, that the products of their labor will remain the same in value. It is almost impossible that it should be otherwise, inasmuch as the supply of cotton hardly keeps pace with the demand. It is true, our tax may be temporarily increased, BUT IN THE END THAT WOULD BE COUNTERBALANCED TEN TIMES OVER, BY THE SINGLE ITEM OF DIRECT TRADE WITH EUROPE AND THE SAVING TO US IN DUTIES WOULD PAY OUR GOVERNMENT EXPENSES AND LEAVE A LARGE SURPLUS.[12]

Holt regarded the "probable troubles" which would ensue from secession as being more "imaginary than real," but he spurned the idea that Southern men would be deterred from asserting their rights even if war should result. No man, said Holt, whom "you would fear to trust in your negro quarter to talk with your slaves" should be tolerated by the Southern States as President over them. To accept Lincoln as President would, therefore, bring to the South neither peace nor safety. Men who heretofore had "battled for the Union all their lives" were now joining the secession movement as the only path of peace and safety. And, said Holt,

> why do you see the hitherto unheard of spectacle in the South, ministers of the gospel, who have been up to this moment lookers on, now speaking out; Baptists, Methodists, Episcopalians, Presbyterians, all raising their warning voices and telling us to be up and doing—to wait longer is weakness and folly. Venerable Doctors of Divinity whose work on earth is nearly ended, whose heads have whitened in the service of the living God, tell us they can hold their peace no longer, . . . have spoken now, and in arguments which cannot be answered, have proved that our only hope for peace and safety is in a Southern Confederacy.[13]

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[12]MS. Like views expressed in letter of B. B. Trousdale to Andrew Johnson, Corinth, Miss., Dec. 17, 1860, Johnson Papers, Vol. 2, p. 313. See also letter of W. A. Ward to "My Fellow Citizens of Clark" county, in *Eastern Clarion*, Dec. 12, 1860.

[13]See the previous installment for the rôle played by the Churches in the controversy over secession in the State.

Wiley P. Harris has left in his Autobiography an interesting account of the canvass for the Convention of 1861 in Hinds county, which, like Adams and Warren counties, was never, in the period 1840-1860, found in the Democratic column. In the Presidential election of 1860, Hinds county, out of a total of 2529 votes, had cast a majority of 499 for Bell and Douglas The county was regarded as a stronghold of Union sentiment and the fact that the Southern Co-operation candidates, William Yerger, Fulton Anderson, and Amos R. Johnson, three of the most able men in the State, were defeated by about 300 votes by secession candidates of less ability than their Co-operation opponents, furnishes a very interesting and important commentary upon the very radical swing of public opinion towards disunion after Lincoln's election. The story of that canvass can be best told in the words of Wiley P. Harris himself. "When I was urged to become a candidate for the Convention of 1861 for Hinds county," said Harris,

> I remember to have replied that it was one of those movements which if it meant anything would not end speedily, and that I was loath to embark on it, because I did not clearly see where I was or where I was to land.
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> I was not put on a platform, nor was any plan of operation prescribed to me. Col. Lamar had made a speech to the Legislature which called the Convention together. That speech had the effect of showing to the people that a withdrawal from the Union was practicable but the orator did not distinctly recommend secession as I understood him. It was a fine flowing, sparkling speech made up of generalities, but it had the effect of lodging in men's minds the idea of secession as the only remedy or at least as a practicable remedy.
>
> My colleagues were not gifted with the faculty of speech making and our opponents were the very ablest men in the State, William Yerger and Fulton Anderson [Amos R. Johnson, too]. They obtained the advantage in every debate except the last, which was held at Jackson. In that debate which closed the campaign the victory was awarded to me, but the audience was largely on my side at the beginning.
>
> The character of these discussions exhibited the uncertain attitude in which men stood towards an unmanageable difficulty. We professed to be united on secession as the ultimate remedy. My opponents charged me with advocating secession by Mississippi with or without the co-operation of the other States. I charged them with the advocacy of a scheme, which, whether so designed or not, was destined to fail of any result, through dilatory measures, conventions, conferences, debates and resolutions, all ending in no decisive act and that we would be covered with disgrace by it. That if there was in the present attitude of the free States

cause for secession at all it was cause for it now. I conceded that one State could not maintain herself out of the Union, but that they must withdraw each for herself and one must venture to take the step in advance. I was morally certain that a sufficient number would speedily follow, to insure the safety of those which took the step. My real conviction was that the border States would hesitate, but that one of two things would follow. They would put themselves in a position to prevent war; that if they joined the movement, war would not ensue because the conquest of the slave States would be impossible: if they did not join us they would be instruments of a settlement. Adhering to the Union their influence would be potent, and they would in all likelihood present the basis of settlement upon the acceptance or rejection of which depended the withdrawal of all the slave States, or the adhesion of all. The latter course, it seemed to me, was morally certain. I therefore expressed the belief that there would be no war. My opponents on the contrary argued that secession would surely be followed by a war of great stubbornness. Their plan as they exposed it, was to get first the co-operation of the border States, and then to move. My idea was that there was no means of getting that co-operation in a reliable form. That the advice of these States would be to delay action to try other methods, because they for several reasons would at first be averse to any step looking to separation, but when they found that a majority of the slave States had taken the decisive step they would oppose making war upon them and if war was begun they would certainly join the South or claim at the hands of both the seceding States and the free States the right to interfere to prevent war, and bring about an adjustment.

I took the ground of withdrawal, believing firmly that a majority of the slave States would withdraw, and this step would bring about a settlement.

All the earnest thought I gave to the subject brought me to this conclusion. I confess that I did not undertake to solve the problem, involved in the existence of two independent republics, on this continent, because I regarded the experiment, or the attempt to maintain them as remote. I confess, moreover, that I shunned the contemplation of such a condition. I doubt if very many men of that day out of South Carolina had formed definite conclusions on that point.

The argument of my opponents in favor of first sounding the border States, and considering their suggestions, and the picture they drew of a few States taking a leap in the dark, the certainty of a resort to force, by the Federal government, and the consequences that must inevitably follow, I found difficult to meet. What appears very strange was that this argument lost its influence when these gentlemen spoke of the certainty of our being overpowered, whilst the people took good heed of all that I said, which went to show that war was improbable. When I turned upon my opponents and asked if such arguments had prevailed

when our forefathers proposed to withstand the mother country; there was always a great risk in these movements by the people, etc., the people applauded; the general sentiment was averse to war; and there was a general desire to avoid it by thinking men. At the same time there was a blind confidence that its issue would not be fatal to us. It is difficult to define the grounds upon which this rested. One was that the formation of large armies by the slave States would not be attended by any material diminution of the chief industry owing to the possession of slave labor by which it was maintained. Another was that the Northern people would, shut out from our cotton, and our custom as buyers of her manufactures, and her grain and meat, soon tire of a war which would entail such costly sacrifices. There was at the time great faith in these considerations. Ignorance and passion completed the work. I did not understand the Northern people. We overlooked the vast superiority of the North in the very resources needed in war. I should say moreover that we had persuaded ourselves that England and France would not tolerate a blockade. And therefore the want of a navy would be in a measure supplied. It seems to me now that such considerations would not have weighed with us had there been a certainty of war, but it was thought improbable that we would have it.

I had heard during the discussions of the Kansas and Nebraska Bill contemptuous allusions made to our repeated threats to secede, and especially to the abortive issue of the last staggering and ill directed effort. The Northern speakers, I mean those who allowed themselves to give utterance to their real feelings, not only scouted the notion of secession but ventured to say that the Northern people would "whip the seceders into the traces." I WAS NOT PROOF AGAINST THESE THRUSTS AND FINDING the movement of 1860-61 on foot, I felt the strongest desire to see it wear the form of a determined purpose to incur all the hazards which the attempt to maintain our proper footing in the Union or to withdraw from it might involve. Another breakdown would entail consequences as it then appeared to men, not less fatal to our position in the Union than defeat in civil war. I candidly admit that many weighty considerations were entirely disregarded or overlooked by me in an absorbing anxiety, lest the movement should fail in its early stages.[14]

Rankin, an adjoining county of Hinds, was carried by Breckinridge by a majority of 160 but in the canvass for the Convention it cast a majority of 120 for the Co-operationist candidates. The contest in Rankin seems to have been unusually spirited and the secessionists of the county imported from Jackson "their 'big guns,' Freeman, Wharton, and Barksdale," in order to stem the tide of Union sentiment in the county, but to no avail. According to a correspondent of the *Vicks-*

[14]MS.

burg Whig, "almost every office-holder was out doing his best for the seceders; and towards the close of the canvass the appeal was boldly made for the Democracy to rally! Such demagogism was never resorted to. On the day of the election the 'rag-tag and bob-tail' of creation were pulled in to vote the secession ticket. Whiskey was freely given; promises of corn and meat made. Threats were made; in fact, all means used, and the lowest, meanest and dirtiest tricks resorted to, but all in vain. We made the fight on our co-operation platform, and took issue with the plan and editorials of the *Mississippian.*"[15]

The canvass for delegates to the Convention of 1861 did not command the active and enthusiastic interest of the voters of Mississippi. Only sixty per cent of those who voted in the Presidential election six weeks earlier troubled themselves to cast their votes for delegates to the Convention. The time given for reflection upon the issues involved was exceedingly short and thousands stayed away from the polls because they were confused and did not understand the bearings which the issues raised would have for the future.[16] The election demonstrated, in spite of its secession majority, that there was still a rather formidable Conservative Union sentiment in the State. This Union strength was to be found largely in the Mississippi-Yazoo River counties and in the hill counties of Northeast Mississippi.[17] A detailed study and analysis of the returns for both the election of candidates to the Convention of 1861 and for that of Presidential in 1860, are presented to show precisely how each county in the State voted.[18]

The Union forces in the State felt that as a result of the election they had been overwhelmed by the intemperate views of the Secessionists and that the State, and the country as a whole, was "drifting into a state of anarchy, disorder and ruin." B. L. C. Wailes, in despair and disgust, when the President of the United States—and after him Governor Pettus—issued a proclamation appointing a day of "humiliation and prayer" in consideration of the "unhappy and threat-

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[15]*Vicksburg Whig,* December 25, 1860

[16]*Natchez Courier,* December 27, 1860.

[17]MS. James M. Jones to Andrew Johnson, Corinth, Miss., December 29, 1860, says: " . . . Your own State is little less attached to the Constitution than the Northern counties of Mississippi, who are ready to coerce violators of the law and the Constitution no matter whether in Maine or South Carolina." Johnson Papers, Vol. 3, pp. 607-609. See also, the election returns for the Northeast Mississippi counties.

[18]An editorial in the *Natchez Courier* for January 3, 1861, on the result of the election for candidates to the Convention confirms the general conclusions reached by the writer and set out above.

RELATION BETWEEN SLAVES, COTTON, AND POLITICS IN THE MISSISSIPPI–YAZOO RIVER COUNTIES, IN 1860

The shaded counties contained:

101,455 or 28.69 per cent of the total of 353,631 whites; 249,017 or 57.03 per cent of the total of 436,631 slaves. #

Produced:

707,838 or 56.3 per cent of the 1,257,507 bales of cotton. #

Cast:

11,210 votes for Breckinridge; 10,836 votes for Bell and Douglas

Cast for Delegates to the Convention of 1861

4,965 votes for Separate State Secession.*

6,221 votes for Southern Co-operation.*

Compiled from the Census Report for 1860
Yield in Washington and Sunflower counties estimated on basis of 3 bales to the slave, about the average for the region.

* The Coalition vote in Carroll, DeSoto, Holmes, and Panola not counted. Returns in Tunica and Yallobusha are missing. Vote estimated at 50% of that for Presidential Electors in 1860

ening" state of affairs, confided to his Diary: "What a poor imbecile, blundering, incompetent executive this Union has been cursed with through the rule of the Democratic party. The name of James Buchanan will be forever infamous when the wreck of this glorious Republic, which he has so largely contributed to overthrow, is thought of." Such "miserable demagogues" as Buchanan and Pettus, as well as other secession leaders, should "humble themselves in sackcloth and ashes."[19]

The Secessionists, on the other hand, were elated over the result of the election and regarded the separate secession of the State as being definitely determined. Horace H. Miller, Commissioner from Mississippi to Texas, wrote that " . . . The result of the election, I suppose, settles as to the action of our State; although I regret that we will be handicapped by the presence of so many Submissionists in the Convention."[20]

RELATION BETWEEN THE MISSISSIPPI VOTE FOR PRESIDENTIAL ELECTORS IN 1860 AND THE VOTE FOR DELEGATES TO THE CONVENTION OF 1861

Names of Counties	Co-operation vote	Coalition vote	Separate State Seces. vote	Uncertain vote	Breckinridge vote	Bell vote	Douglas vote
Adams*	532	...	162	...	376	448	158
Amite*	382	...	268	...	427	383	3
Attala*	651	...	614	...	1030	525	5
Bolivar*	202	...	179	...	218	277	12
Calhoun*	518	...	406	...	791	355	54
Carroll‡	...	860	...	...	1185	788	11
Choctaw*	597	...	934	...	1310	642	25
Chicksaw‡	...	761	...	...	1070	538	33
Claiborne*	143	...	322	...	421	263	26
Clarke*	107	...	546	...	904	343	76
Coahoma*	172	...	62	...	157	213	41
Copiah	000	...	799	...	1042	538	14
Covington@	...	...	...	319	391	106	8
DeSoto‡	...	841	...	...	745	845	401
Franklin*	263	...	235	...	335	156	3
Green	000	...	67	...	200	45	0
Hancock*	83	...	147	...	257	47	0
Harrison	000	...	314	...	460	88	0
Hinds*	670	...	939	...	1015	1103	411
Holmes‡	...	768	...	...	780	629	9
Issaquena*	73	...	71	...	104	133	6
Itawamba	...	1241	...	...	1684	727	63

[19]MS. Entries for December 20 and 23 and 26, 1860.
[20]MS. Horace H. Miller to John J. Pettus, Vicksburg, Mississippi, December 27, 1860, Correspondence of the Governor, 1860, Series E, No. 49.

Jackson	000	...	194	...	316	17	0
Jasper*	315	...	643	...	712	361	18
Jefferson*	119	...	282	...	333	266	49
Jones*	166	...	89	...	263	96	0
Kemper	000	...	531	...	689	499	69
Lafayette‡	...	834	...	...	1034	686	144
Lauderdale*	341	...	611	...	951	353	141
Lawrence@	...	...	...	587	839	146	5
LeakeΦ	...	...	...	...	690	368	2
Lowndes*	135	...	819	...	929	676	36
Madison*	343	...	580	...	524	627	17
Marion	000	...	98	...	298	235	2
Marshall*	1016	...	1109	...	1149	1098	269
Monroe*	472	...	893	...	1273	612	49
Neshoba@	...	...	...	659	732	162	10
Newton*	144	...	394	...	684	217	29
NoxubeeΦ	000	...	383	...	...	...	...
Oktibbeha	000	...	410	...	746	259	20
Panola‡	...	730	...	...	551	700	186
Perry*	71	...	88	...	201	105	6
Pike*	197	...	326	...	831	221	0
Pontotoc‡	...	1280	...	...	1512	845	330
Rankin*	578	...	458	...	676	505	11
Scott	000	...	305	...	693	299	8
SimpsonΦ	...	...	...	317	370	136	3
Smith*	157	...	339	...	517	234	5
Sunflower*	43	...	117	...	185	138	1
Tallahatchie	171	...	000	...	285	266	35
Tippah‡	...	1305	...	...	1456	826	254
Tishomingo*	1925	...	729	...	1748	1412	303
TunicaΦ	...	...	...	...	122	140	9
Warren*	736	...	174	...	580	816	83
Washington*	129	...	122	...	180	201	0
Wayne*	78	...	121	...	180	110	0
Wilkinson*	306	...	334	...	404	324	34
Winston*	...	...	...	...	800	299	3
YalobushaΦ	...	...	...	...	819	707	76
Yazoo*	383	...	660	...	688	739	4
Total	12,218	8,620	16,874	1,882	39,962	24,693	3,597[21]

*Contested between Southern Co-operationists and Separate State Secessionists.

‡Coalition ticket of Co-operationists and Separate State Secessionists.

ΦReturns missing.

@Data not available with reference to the positions of candidates during the canvass.

[21]MSS. *Records of the Secretary of State,* Series F, Vol. 83, Returns of the election for delegates to the Secession Convention.

Ibid., Vol. 85, Returns for Presidential election in November, 1860, in fifty-nine counties.

SUMMARY OF THE VOTE

A—For the Convention of 1861:

1. Southern Co-operation	12,218	votes
2. Separate State Secession	16,874	votes
3. Coalition tickets	8,620	votes
4. For candidates whose positions during the canvass were uncertain	1,882	votes
5. Estimated vote for four counties with missing returns	2,062	votes[22]
Total vote for the Convention	41,656	

In thirty-three counties in which there were contests between Southern Co-operationists and Separate State Secessionists, the vote was:

1. For Southern Co-operation	12,047
2. For Separate State Secession	13,773

The vote for Presidential electors in the same thirty-three counties was:

1. For Breckinridge	20,353
2. For Bell and Douglas	15,874

B—For Presidential Electors in 1860:

1. Total for Breckinridge	39,962
2. Total for Bell	24,693
3. Total for Douglas	3,579
4. Total estimated vote for Noxubee County	786
Grand Total of votes cast for Presidential electors	69,020

[22]The vote in the counties of Leake, Tunica, Winston, and Yalobusha is estimated at 50 per cent of that of the vote in those counties for Presidential electors in 1860.

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NOTE AND COMMENT

CREDITORS' BILLS TO SET ASIDE FRAUDULENT CONVEYANCES IN MISSISSIPPI

"Creditors are a favored class and the preservation of their rights is a fundamental policy of all enlightened nations."[1] Credit is extended through trust, a breach of which abuses the confidence of the business world, which tends toward unusual restrictions being placed upon individual credit, ultimately impairing the stream of commerce which is so vital to the accumulation of greater profits in the field of trade. Time out of memory man has wrinkled his brow in order to contrive some scheme by which he might avoid his just debts, while on the other hand our courts have been slow in reaching the point where they could properly cope with the absconding debtor. The earliest recorded history of such legislation is to be found in the Magna Carta[2] of England: "The article in the famous charter provided that no freeman should give away his land so that no residue would remain to the lord of the fee, out of which the service pertaining to the fee might be enforced."[3] Fragments of this old charter may be found incorporated in our present day statutes against "frauds."[4] The spirit of the law as it exists today was incorporated in that charter, but common-law courts were centuries in giving to it the proper interpretations, and applying to it the proper remedies, as they exist today.

A proper study of the "Creditor's Bill" might be begun from the time of Queen Elizabeth; for it was during her reign that the statute of 13 Elizabeth, c. 5, was passed, making null and void all conveyances made with the intention of defrauding one's creditors.[5] A portion of 13 Elizabeth reads as follows:

> "Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Reliefs, by such guileful, covinous or fraudulent Devices and Practices, as is aforesaid, are, shall or might be in any ways disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate and of none effect; and Pretence, Colour, Feigned Consideration, expressing of Use, or any other Matter or Thing to the contrary notwithstanding."[6]

Previous to the passing of 13 Elizabeth, the Parliament of England had begun to legislate against fraudulent conveyances. Outstanding

[1] STORY, EQUITY JURISPRUDENCE, (6th ed.) § 350 (1853).
[2] June 15, 1215.
[3] 27 C. J., 414.
[4] MISSISSIPPI CODE ANNOTATED, 1930, § 3343.
[5] 1570.
[6] Further elaboration of statute fund in 29 Elizabeth, c. 5.

among these are the Statutes of Richard II, enacted in 1379;[7] the Statutes of Edward II, enacted in 1376;[8] the Statutes of Henry VII, enacted in 1487.[9] At the same time, these statutes, as passed by Parliament, were merely declaratory of the common law as it existed in its earliest stages; a fraudulent conveyance could be set aside at any time. Further, the passage of such statutes were resented by such great judges as Mansfield, who said: "The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statute."[10]

The statute of 13 Elizabeth, as consequently modified by English legislation, against frauds, and fraudulent conveyances, has been adopted in practically all the states of the Union, or recognized as a part of the common law; being more or less expressly adopted or reenacted in most code states in similar terms.[11]

The first appearance of the creditor's bill, as we know it today in Mississippi, was in the CODE OF 1822, its purpose being to prevent frauds and perjuries.[12] The act provides that it shall not extend in any case, "to creditors whose debts were contracted after such fraudulent act, unless made with intent to defraud them";[13] and though a conveyance be declared void as to subsequent creditors, it shall not on that account be void as to subsequent creditors of purchasers.[14]

In the CODE OF 1857 there is a section (351) which gives the power to circuit courts to stay proceedings and have the sheriff to go and discover out the property, and then it becomes a question of fact for the jury to decide as to whether or not the conveyance was made in fraud of creditors. This section seems to utterly deprive equity of its former jurisdiction in the matter—the remedy at law being totally adequate, but, as far as this writer has been able to discover there has been no application of this statute in any of the cases. No notable changes were made in the statute against fraudulent conveyances until 1880.[15]

The statute as it is actually known in practice today had its origin in the REVISED CODE OF 1880; there it is to be found for the first time in the codes of Mississippi, with its three sections reading as follows:

> "11. Creditors May Attack Fraudulent Conveyances, Etc.
>
> "§ 1843. The said court shall have jurisdiction of bill exhibited by creditors, who have not obtained judgments at law, or having obtained judgments, have not had execution returned unsatisfied,

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[7] St. 2 Rich. II c. 3.
[8] St. 50 Edw. II c. 6.
[9] St. 3 Hen. VII c. 4.
[10] Coke, L.TT. 76a, 290b.
[11] See *Carlisle* v. *Tindall,* 49 Miss. 229 (1873).
[12] GEORGE, MISSISSIPPI DIGEST, 336-339 (1872).
[13] This same statute is to be found in the REVISED CODE OF 1857, p. 358. An excerpt of this statute is also set out in the REVISED CODE OF 1880, § 1293.
[14] This provision is not to be found in the Act of 1822. This statement, with certain limitations, is to be found in the MISSISSIPPI CODE ANNOTATED, 1930.
[15] There were no changes made in CODE OF 1871.

to set aside fraudulent conveyances or property or other devices resorted to for the purpose of hindering, delaying or defrauding creditors; and may subject the property to the satisfaction of the demands of such creditors, as if complainant had a judgment and execution returned 'no property found.'

"§1844. Upon such bill a writ of sequestration or injunction, or both, may be issued upon like terms and conditions as such writs may be issued in other cases, and subject to such proceedings and provisions thereafter, as are applicable in other cases of such writs.

"§1845. The creditor in such case shall have a lien upon the property described therein from the filing of his bill, except as against bona fide purchasers before service of process upon the defendant in such bill."

Although two very important changes were made in this section of the statute in the Laws of 1898, none were made in the Code of 1890 —except to incorporate the three sections into one[16]—the statute remaining unchanged until the passage of the Laws of 1898. But in the Constitution of 1890, jurisdiction was expressly given to chancery courts to set aside fraudulent conveyances.[17] Also, at this point it would be well to note the fact that although this section had been added to the laws against fraudulent conveyances, there still remained a similar section in the Code, which read:

"Every gift, grant, or conveyance, of lands, tenements or hereditaments, goods or chattels . . . made, and contrived of malice . . . to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, . . . to be clearly and utterly void; etc."[18]

In the Laws of 1898, the statute appears as it is today; with its contents reading as follows. (The changes from the Code of 1880, or additions, are written in bold face):

"Creditors may attack fraudulent conveyances, etc.—The said court shall have jurisdiction of bills exhibited by creditors who have not obtained judgments at law, or having judgments, have not had execution returned unsatisfied, **whether their debts be due or not,** to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering, delaying or defrauding creditors; and may subject the property to the satisfaction of the demands of such creditors as if complainants had judgments and execution thereon returned 'no property found.' upon such a bill a writ of sequestration or injunction, or both, may be issued upon like terms and conditions as such writs may be issued in other cases, and subject to such proceedings and provisions thereafter as are applicable in other cases of such writs; **and the chancellor of the proper district shall have power**

[16] Code of 1890, § 503.
[17] Constitution of 1890, § 159.
[18] Revised Code of 1880, § 1293.

> and authority to grant orders for receivers, in the same manner as if the creditor had recovered judgment and had execution returned 'no property found.' The creditor in such case shall have a lien upon the property described therein from the filing of the bill, except as against *bona fide* purchasers before the service of process upon the defendant in such bill."[19]

This statute may be found, in precisely this same form, in the MISSISSIPPI CODE ANNOTATED, 1930, § 407.

It might be interesting at this time to draw an analogy between the Uniform Fraudulent Conveyance Act,[20] which was adopted in 1918 and recently incorporated into the statutes of a number of states,[21] and our own statute against fraudulent conveyances. The Act is stated as follows:

> "Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may: (a) Restrain the defendant from disposing of his property, (b) Appoint a receiver to take charge of the property, (c) Set aside the conveyance or annul the obligation, or (d) Make any order which the circumstances of the case may require."

On a careful inspection of the two laws it is to be observed that they are substantially the same, there being no greater powers delegated to the courts under this Act than are exercised in our chancery courts under the statute.

Now that we have traced something of the history of the bill from the earlier English law into our own codes, and the changes made within them in successive years, we will turn our attention to the present use of the creditor's bill as reflected through past and present judicial interpretations of these different statutory and common law rules.

The purpose of such a bill is to bring into existence the equitable powers of the court to enforce the satisfaction of a judgment by means of an equitable execution; because the complainant has been unable to obtain proper execution at law. Such bills are in the nature of an "equitable execution" pending equitable relief, which are granted on the ground that there is no remedy at law. Judge Griffith, in his work on MISSISSIPPI CHANCERY PRACTICE, clearly and forcefully expresses the object of the statute, stating that it

> "is to prevent the necessity of a creditor resorting first to a court of law to recover a judgment and then going into equity to secure

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[19] LAWS OF 1898, ch. 64.

[20] 9 UNIFORM LAWS ANNOTATED, § 10, p. 181 (19923).

[21] Ariz., Del., Md., Mass., Minn., Nev., N.H., N.J., N.Y., Penn., S.Dak., Tenn., Utah, Wis., Wyo.

> its satisfaction; and, to effectuate that end the attaching creditor is given a statutory lien on the property fraudulently conveyed and a foreclosure thereof may be had in the same proceedings; and, the court having acquired jurisdiction for the purpose of affording this relief does not stop short of giving to the parties all the relief which the case requires."[22]

Strikingly similar to Judge Griffith's interpretation of our own statute against fraudulent conveyances is a comment made by Gerrard Glenn, of University of Virginia, on the section of the Uniform Fraudulent Conveyance Act above referred to, in which he cites a New York case, *American Surety Co.* v. *Conner,*[23] where the court said that the effect of the statute,

> "is to abrogate the ancient rule whereby a judgment or lien were essential preliminaries to equitable relief against a fraudulent conveyance." The act "is explicit that a creditor may now maintain a suit in equity to amend a fraudulent conveyance, though his debt is not matured. It is not believable that a creditor with a debt already due was to be placed in a less favorable position, or beset by greater obstacles. For the one as the other the path is to be cleared of harassing impediments to the swift pursuit of justice."[24]

Both authors point out that there has been an abrogation of the "ancient rule" by their respective laws; in Mississippi, by statute, in sixteen other states, by the Uniform Fraudulent Conveyance Act.

These laws have grown out of the ineffectiveness of legal execution, and are designed to aid creditors in reaching property of their debtors not reachable by ordinary process.[25] For further study reference might be made to the following outstanding cases: *McBride et al.* v. *State Revenue Agent,* and *Heirmann & Kahn* v. *Stricklin.*[26]

Thus the creditor has been able to protect himself from the evil devices of his elusive debtor through the medium of this statute, but further relief was necessary. Under the Code of 1880 those creditors whose debts were not due still experienced some difficulty in preventing their debtors from wasting their substance before the time for payment of the debt had arrived. Prior to the Laws of 1898 the suits of creditors were often defeated in this manner.[27] This loophole was eliminated in the Laws of 1898, *supra,* by the addition of the words, "whether the debts be due or not."

Prior to the Revised Code of 1880 the greatest obstacle confronting the creditor was the necessity of a judgment at law before he could file his bill in equity to set aside the fraudulent conveyance. "There was formerly no little controversy in the courts of this country as to

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[22] Griffith, Mississippi Chancery Practice, § 500, p. 534 (1925).
[23] 251 N.Y. 1, 166 N.E. 783 (1929).
[24] Glenn, "The Uniform Fraudulent Conveyance Act: Rights of Creditors without Judgment," 30 *Columbia Law Review,* 202, at 203 (1930).
[25] 27 C.J. 413.
[26] 70 Miss. 716, 12 So. 699 (1893); 60 Miss. 234 (1882).
[27] *Browne* v. *Hernsheim,* 71 Miss. 574, 14 So. 36 (1893).

whether equity, in the absence of the usual grounds for equitable interference, had any jurisdiction whatever to aid creditors to reach property not subject to execution."[28] In Mississippi prior to the statute of 1880 the law was that,

> "A bill in chancery is not good to set aside a fraudulent conveyance procured by a debtor to be made to his daughter if it neither alleges that there is a judgment against the father, nor that the debt was due at the time the conveyance was made is still due, and fails to pray for such relief. . . . A conveyance to a third person at the instance of the debtor, who pays the purchase-money, vests no title in the debtor which can be sold on execution. It must be attacked in equity after recovery of a judgment."[29]

This rule was changed by the statute, and on this particular point Cooper, J., in the case of *Citizens Mut. Ins. Co.* v. *Ligon*,[30] said,

> "The object of this statute was to prevent the necessity of a creditor resorting first to a court of law, to recover a judgment, and then going into equity to secure its satisfaction."

By this statute creditors of our state are afforded a more expeditious remedy by which they may reach the concealed legal assets of the debtor. But in spite of this statute it must be acknowledged that the old rule was supported by sound authority and good reason:

> "It should not be in the power of a creditor to institute such an extraordinary remedy against his debtor for no other reason than that his debt is overdue. A debtor may be able to relieve himself from threatening insolvency by the time an execution is obtained and demanded of him. His inability or unwillingness to pay should be established by some certain rule. What more reasonable one could be devised than that there shall be a judgment, an execution and a return *nulla bona?*"[31]

To this question the answer might be: the reasoning is good, no doubt, but the legal results, as too often shown, have not been the most satisfactory ones possible. And, further, in order that a more expeditious remedy might be had, our courts have always allowed the complainant to come into equity when his remedy at law had not yet been exhausted. This relieves him of the necessity of waiting until the cumbersome wheels of the law have ground out justice; instead the complainant may resort to equity before his legal remedy has been fully tested:

> "There is no room to doubt that a judgment-creditor, in this state, may resort to equity, not only for the purpose of subjecting property to his judgment which cannot be reached by execution,

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[28] 8 R. C. L. 3, § 2.
[29] *Ferguson* v. *Bobo*, 54 Miss. 121 (1876).
[30] 59 Miss. 305 (1881). An able discussion on this point can also be found in the case of *Carlisle* v. *Tindall*, 49 Miss. 229 (1873).
[31] 8 R. C. L., § 27, pp. 27-28.

> after he has pursued the remedy at law to a return *nulla bona* on his execution but also before he has exhausted the remedy at law, in order to remove obstructions to a fair sale of property liable to his execution."[32]

Also, "A court of chancery will remove obstructions to a fair sale of property under an execution, though the property is legally liable to be sold under execution."[33]

By the foregoing discussion the different steps that led up to our present creditor's bill have been shown, along with the changes made in the statutes by different legislative bodies, and interpretations given to these changes by the courts. Our attention will now be directed toward the procedure to be taken by the creditor today in bringing to light the fraudulent acts of his debtors—the methods by which he obtains the hidden property, which he finally applies in satisfaction of debts due him by his recreant debtor.

First, who are creditors? What must be the legal status of party before he can bring his cause before the courts? From CORPUS JURIS we learn that:

> "The term 'creditors,' as employed in the statutes, is not used in a strict technical sense, but has been construed liberally, and includes all persons who have accounts, claims, demands, interests, or causes of actions for which they are entitled to recover any debt, demand, penalty, or forfeiture, and who may be hindered, delayed, or defrauded by such conveyances."[34]

From the case of *Pennington* v. *Seal*,[35] we take the following definition of "creditors" as held by the Mississippi Supreme Court:

> "The general rule is, that a liberal construction must be put upon the statute in allowing the character of creditor. Hence, a person liable contingently as an accommodation endorser, before the dishonor of a note, is a creditor. So also a surety of the principal obligor and of a co-sureties, from the time the obligation is entered into. A trustee becomes a debtor from the time he receives the trust funds."

A trustee in bankruptcy may be a creditor.[36] A party suing in tort is considered to be a creditor from time of filing suit, and may, after securing judgment, maintain a bill to set aside a conveyance by the tort-feasor, after commencement of the suit, such conveyance having been made by the defendant "with actual intent to baffle, delay, defeat or defraud him in the collection of his claim."[37] But an action in tort cannot be joined with a suit to set aside a fraudulent conveyance

[32] *Lewis* v. *Cline*, 5 So. (Miss.) 112, not off. rep. (1888).
[33] *Vasser* v. *Henderson*, 40 Miss. 519 (1866); *Fowler* v. *McCartney*, 27 Miss. 509 (1854).
[34] 27 C. J., § 120, p. 475.
[35] 49 Miss. 518 (1873).
[36] *Thompson* v. *Bank*, 84 Miss. 54, 36 So. 65 (1904).
[37] *McInnis* v. *Wiscasset Mills*, 78 Miss. 52, 28 So. 725 (1900).

so that both may be brought originally in equity.[38] As a general rule the suit is not personal to the original creditor, but may be exercised by his successors or assigns whenever he might have done so.[39] A surety,[40] or an accommodation indorser may maintain a bill against his principal debtor, after he has paid the debt.[41] Furthermore several creditors may join in the same bill; or after a bill has been filed by one creditor several others may join with him in pursuit of the property.[41a]

In some states courts of law and equity have concurrent jurisdiction in the matter of affording relief against fraudulent conveyances by debtors, but not so in Mississippi, where the rule is that,

> "The affording of relief to creditors against a fraudulent conveyance of the property of the debtor constitutes a substantial ground for the assumption of jurisdiction by a court of equity."[42]

And,

> ". . . especially will a court of equity not refuse it [jurisdiction] where the wrong alleged is stated to have been done by contrivance and combination . . ."[43]

There yet remains to be considered the mechanics of a creditor's bill. Such a bill must state all the facts and circumstances necessary for recovery in the particular case, there being very little that can be left to be inferred by the court. The bill must be the soul of clarity and perfection: "doubts, suspicions and inferences will not suffice."[44] The following are some of the more essential averments of the ordinary bill: The complainant must clearly set out his status, either as creditor or as the representative of the creditor, which entitles him to all the rights to bring the suit.[45] If he sues as assignee he must state same. He must allege what proprietary interest the debtor had in the property fraudulently conveyed. If it is a conveyance of property there must be some description of the instruments by which the conveyance was made; but it is not necessary to attach a copy of same to the writ.[46] If it is land there must be a definite description of the land sought to be reached.[47] In some states it is necessary to aver the insolvency of the defendant at the time of commencement of the action, but in Mississippi the rule is:

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[38] *Jones* v. *Jones,* 79 Miss. 261, 30 So. 651 (1901).

[39] *Cook* v. *Ligon,* 54 Miss. 368 (1877).

[40] *Ames* v. *Dorroh,* 76 Miss. 187, 23 So. 768, 71 Am. St. Rep. 522 (1898); *Pennington* v. *Seal, supra.*

[41] *Ames* v. *Dorroh, supra.*

[41a] On the general question of parties to the bill, see Griffith, *op. cit.,* § 121, p. 124. As to whether the fraudulent grantor is a necessary or proper party, see *Taylor* v. *Webb,* 54 Miss. 36 (1876); *Anderson* v. *Newman,* 60 Miss. 536 (1882).

[42] *Pulliam* v. *Taylor,* 50 Miss. 551 (1874).

[43] *Catchings* v. *Manlove,* 39 Miss. 655 (1881); *McBride* v. *Adams,* 70 Miss. 716, 12 So. 699 (1893).

[42] *Pulliam* v. *Taylor,* 50 Miss. 551 (1874).

[43] *Catchings v. Manlove,* 39 Miss. 655 (1861); *McBride* v. *Adams,* 70 Miss. 716, 12 So. 699 (1893).

[44] Griffith, *op. cit.,* § 501, p. 536.

[45] *Ferguson* v. *Bobo, supra.*

[46] *Levy* v. *Royston,* 84 Miss. 15, 36 So. 69 (1904).

[47] Prior to Laws of 1898 the bill had to allege that the debt on which it is founded was due.

> "A bill filed under the statute need not show that the debtor is insolvent, nor that complainant cannot obtain satisfaction of his demand without resorting to the property in suit."[48]

But where a party deems it necessary to his recovery mere averments of insolvency have been held to be sufficient.[49] Fraud is a necessary element, and must be pleaded and proven: the particular facts that constitute the fraud must be set out, whether from knowledge or on information and belief. Fraud cannot be inferred. It must appear by specific averments in what manner the fraudulent acts have injured the complainant; or, in the words of Judge Truly,

> "No principle of equity jurisprudence is more firmly established than that, where a fraud is relied on as a basis of relief sought from a chancery court, the facts of which the charge of fraud is predicated must be specifically stated with full definiteness of detail. No general averments of a fraudulent course of business, and no bare statement of a corrupt design on the part of the defendant is sufficient. The acts themselves which are claimed to be fraudulent must be clearly set out. It must further appear, by definite averment, in what manner the fraudulent acts wrought injury to the complainant."[50]

A bill need not be incumbered with surplusage, it being sufficient if the facts are set out in a clear, connected and consistent narrative form.

The next question that presents itself is, what property may be reached by this bill? To this query the reply is that "The manifest tendency of the authorities is to reclai mevery species of the debtor's property."[51] And it may be stated as a general rule that every kind of property of any substantial value—whether real or personal, legal or equitable, vested, reversionary or contingent—which is subject to the payment of debts, is susceptible of fraudulent alienation, and may be reclaimed by creditors in a proper case.[52] Thus it may be stated that all manners of property may be reached by such a bill, and it is not limited to conveyances, such as deeds,[53] voluntary assignments,[54] etc. It might be well to note here that homesteads being exempt by statute the owner has a perfect right to convey one at any time and the motives moving him do not in any way affect the title of the grantee.[55]

A conveyance may be fraudulent as to subsequent creditors when it is made with an evident intent to defraud them; but whether a conveyance is fraudulent as to subsequent creditors is peculiarly a matter for the determination of the jury.[56] "Fraud does not, however, con-

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[48] *Bank* v. *Buddig,* 65 Miss. 284, 4 So. 94 (1887).

[49] *Ogden* v. *Amite County Bk.,* 139 Miss. 875, 104 So. 289 (1900). See also *McInnis* v. *Wiscasset Mills, supra.*

[50] *Weir* v. *Jones,* 84 Miss. 602, 36 So. 533 (1904).

[51] 27 C. J. 417, § 18.

[52] See *Catchings* v. *Manlove, supra.*

[53] *Heirman & Kahn* v. *Stricklin, supra.*

[54] *Bogard* v. *Gardley,* 4 S. & M. 302 (1845); *Swayze* v. *McCrossin,* 13 S. & M. 317 (1849).

[55] *Edlinson & Winn* v. *Meacham,* 50 Miss. 34 (1874); *Willoughby* v. *Pope,* 101 Miss. 808, 58 So. 705 (1911); *O'Connor* v. *Ward,* 60 Miss. 1025 (1883).

[56] *Bogard* v. *Gardley, supra; Wynne* v. *Mason,* 72 Miss. 424, 18 So. 422 (1894). See also *Harney* v. *Pack & Clifton,* 4 S. & M. 229 (1845).

sist in mere intention, but in intention carried out by hurtful acts, and it must be directed by the debtor against his creditor."[57] In those cases where the debtor remains in possession or retains apparent title, "The retention of possession of goods and chattels by the seller is deemed evidence more or less conclusive, of fraud upon existing creditors, of the seller. However, there has been much difference of opinion as to conclusiveness of this evidence."[58] The Mississippi Supreme Court has held that retention of possession by a mortgagor or grantor,

> ". . . in a deed of trust is not *per se* fraudulent, but in order that the possession may be innocent the deed must be recorded or notice of it brought home to the party, before he has dealings with the mortgagor or grantor."[59]

Therefore, we might say as a general rule that,

> "One of the surest tests of a fraudulent conveyance is that it reserves to the grantor an advantage inconsistent with its avowed purpose or secures for him an unusual indulgence, and as a general rule any provision in a transfer of property by a person indebted at the time whereby he reserves or secures a benefit to himself or family at the expense of his creditors, is, unless assented to by them, deemed to be evidence of fraud, either actual or constructive and renders the transfer liable to be avoided at the instance of creditors."[60]

Ordinarily a fraudulent intent must have existed on the part of both grantor and grantee, and therefore must be charged as a fact against both of them, or else it must be shown against the grantor and that the circumstances were such as to put the grantee on notice.[61] Further, there is a presumption in Mississippi that where the debtor conveys a substantial portion of his property for a small sum or by way of gift, that he acts fraudulently as to existing creditors; and he must rebut this presumption by showing he has retained ample property to take care of all his debts and liabilities. But even if he has sufficient property, the courts sometimes refuse to let him set aside any particular property, where it can be shown that it was done for the purpose of hindering his creditors from collecting their dues: for instance,

> "A bill filed under this statute [§ 1843 of CODE OF 1880] need not show that the defendant is insolvent, nor that the complainant cannot obtain satisfaction of his demand without resorting to the property sought to be subjected by his bill."[62]

The only justification for such a stringent rule as the one stated above is that the creditor's bill is an extraordinarily remedy, and that the

[57] 27 C. J. 416, § 13.
[58] *Ibid.*, 598, § 343.
[59] *Hilliard* v. *Cagle*, 46 Miss. 309 (1872).
[60] 27 C. J. 598, § 343.
[61] GRIFFITH, *op. cit.*, § 502, p. 537. Also, *Richards* v. *Vacarro & Co.*, 67 Miss. 516, 7 So. 506 (1890).
[62] *Citizens Bk. of Louisiana* v. *Buddig*, 65 Miss. 284, 4 So. 94 (1887).

courts will grant specific justice in certain cases, no matter how harsh the remedy might be. But where the conveyance was made for ample consideration, the burden is on the complainant to allege and prove fraud, with bad intent.[63] If fraud may be easily implied, as where the consideration was grossly inadequate, the law then fixes the intent.[64]

The precise form which a fraudulent alienation may assume is immaterial, as the statute covers all transfers and dispositions of property made with design to hinder, delay, or defraud creditors.[65] The following is a list of ways in which such fraudulent transfers may be made: (1) Absolute sale for a valuable consideration, paid, and in cases of real property, a conveyance duly acknowledged on the records; (2) an assignment or transfer of a note, life insurance policy, patent right, or other choses in action; (3) a lease; (4) bond and a mortgage; (5) deed of trust mortgage or pledge; (6) voluntary conveyance or transfer; (7) fraudulent judgment; (8) fraudulent attachment; (9) fraudulent foreclosure; (10) fraudulent organization of a corporation and the transfer of property; and other forms of transfer.

The giving of a preference is not fraudulent either in law or in fact:

> "Though a grantor was financially embarrassed and was indebted to others when he executed a deed of trust on land to his wife, who was also a creditor, the trust deed, being for the grantee's sole benefit to secure a valid debt, without any benefit reserved to the grantor, was not in fraud of creditors."[66]

In *Harris v. Sledge,* Whitfield, J., held that, "A debtor in failing circumstances may prefer *bona fide* creditors."[67] This same rule was announced in the case of *Stanton v. Green,*[68] by Handy, J., when he said, if the transfer was made by the debtor "without design of benefitting himself." On this particular point of "preference" Mississippi holds with the majority rule, which is stated in the following decision by the Supreme Court of U. S., in the case of *Jewell v. Knight,*[69] in which the court said:

> "A debtor may lawfully give preference to one of his creditors if he does not thereby intend to defraud the others; and a sale and delivery of the goods in satisfaction of an honest debt cannot be avoided by other creditors, unless made and received with intent in fact to defraud them. The fact that one of the creditors preferred was the debtor's wife does not affect the question."

Now, we have arrived at that very pertinent section of the code which has to do with the filing of the bill. Not only does the filing

[63] *Virden* v. *Dwyer,* 78 Miss. 763, 30 So. 45 (1901).
[64] *Wynne* v. *Mason, supra.*
[65] *Stovall* v. *Farmers & Merchants Bk. of Memphis,* 8 S. & M. 305 (1847).
[66] *Godfrey Frank & Co.* v. *Doughty,* 47 So. (Miss.) 643, not off. rep. (1908).
[67] 21 So. (Miss.) 783 not off. rep. (1897); also see, *Hunt* v. *Ambrose Knox,* 34 Miss. 655 (1857).
[68] 34 Miss. 576 (1857).
[69] 123 U. S. 426, 31 L. ed. 190 (1887).

of the bill give the complainant a prior lien,[70] but it also acts to cut off *bona fide* purchasers without notice. "The creditor who first files his bill is entitled to a priority in the lien thereby created over others who subsequently institute suits, except that those who have judgments do not lose the priority their judgments give them."[71] But the filing of the bill (it need not be sworn to[72]) in order to create the statutory lien in behalf of the complainant must be a filing in the actual sense—that is, a technical filing is not sufficient. Further, the bill must be filed, with issuance of process, since

> "A bill presented to the clerk, and by him indorsed "filed" but retained by plaintiff's counsel for several days without issue of process, is not filed, within the contemplation of law, so as to constitute the commencement of an action."[73]

Nor even does it affect *bona fide* purchasers before service of process upon the defendant,[74] and this is not affected by the filing in the case of a statutory *lis pendens* notice.[75] The general doctrine of *lis pendens,* says Judge Griffith, is,

> "that every person . . . whether *bona fide* or not, who acquires . . . any interest in the property . . . during pendency of suit . . . takes subject to and is bound by, the decree in such litigation; or . . . otherwise expressed, the pendency of the suit is constructive notice to all persons of every fact averred in the pleadings pertinent to the matter in issue . . and of the exhibits set forth."[76]

It is not enough to defeat a bill to set aside a fraudulent conveyance to show that the deed is invalid for want of legal description, if it contain enough to deter bidders if offered for sale under execution.[77] This is upon the same principle that a judgment creditor is allowed, independently of the statute, to remove obstructions to a fair sale of the property liable to his execution.[78]

The next step taken by the court is at the discretion of the judge—namely, the issuance of an injunction and appointment of a receiver, as an ancillary remedy. Generally, "In order to make a creditor's bill effectual, equity will, when necessary, employ the ancillary remedies of injunction and the appointment of a receiver."[79] The lien of the creditor is usually held to be acquired by the commencement of the suit and not by the issuance of an injunction, or the order for a receiver or his appointment.[80] Thus it has been held that an injunction may be granted to prevent waste or to restrain fraudulent con-

[70] POMEROY, EQUITY JURISPRUDENCE, (4th ed.) § 2318 (1918).
[71] GRIFFITH, *op. cit.,* § 504, p. 540.
[72] *Waller* v. *Shannon,* 53 Miss. 500, (1876).
[73] *Meridian Nat. Bk.* v. *Hoyt & Bros.,* 74 Miss. 221, 21 So. 12 (1896).
[74] MISSISSIPPI CODE ANNOTATED, 1930, § 407.
[75] *Fernwood* v. *Meehan,* 85 Miss. 54, 37 So. 502 (1904).
[76] GRIFFITH, *op. cit.,* § 527, p. 570.
[77] *Levy* v. *Royston,* 84 Miss. 15, 36 So. 651 (1904).
[78] GRIFFITH, *op. cit.,* § 504, p. 540. See *Lewis* v. *Cline, supra.*
[79] *Brent* v. *Brister,* 103 Miss. 876, 60 So. 1018 (1912).
[80] MISSISSIPPI CODE ANNOTATED, 1930, § 407.

version or disposition of the property with a view to thwart the creditors' proceedings.[81] The appointment of a receiver is a usual practice, and almost a matter of course where the object of the bill is to reach personal assets, and in this class of cases receivers are almost uniformly granted before answer. However, the bill must contain good grounds for appointment: for instance, the plaintiff must show, first, that he has a clear right to the property, or a lien upon it, or that it constitutes a special fund to which he has a right to resort; second, defendant's possession obtained by fraud, or that the property or income therefrom is in danger of loss from neglect, waste, misconduct, or insolvency of defendant.[82] These facts have to be clearly presented to the presiding judge, as the "Appointment of a receiver is always within the sound discretion of the courts, but the necessity therefor should be clear and the interest of all parties considered."[83] As to what time the judge may exercise his discretion in this matter the CODE states:

> "Receivers may be appointed by the chancellor in vacation, as well as by the chancery court in term-time; and any receiver may be removed by the chancellor in vacation as well as by the court in term-time; but before any receiver shall be so removed in vacation, the party applying therefor must give the adverse party, or his solicitor, and the receiver five days' notice of the time and place of presenting such application; such application may be heard in term time on two days notice."[84]

An annotation to the above section of the CODE states that an appeal did not lie from an order of the chancellor discharging the receiver until the year 1896.[85] The CODE also provides a definite period of time in which notice is to be given to the other party,[86] and the penalty in case such receiver is appointed without notice to other party;[87] also, that at the discretion of the chancellor the other party may put up bond, with adequate sureties,[88] and that, receivers as appointed must give bond for faithful service,[88a] and finally that such receivers are always subject to the orders of the court, or the chancellor in vacation.[89]

The issuing of the injunction is not so prevalant in our courts today, although equity will not hesitate to issue an injunction whenever such a form of relief is necessary. Concerning the issuance of an injunction the CODE has the following to say: "An injunction shall not be granted unless the judge or chancellor shall be satisfied of the complainant's equity and of the truth of the allegations of the bill, by

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[81] 8 R. C. L. 36.
[82] See *Clark* v. *Fleming*, 130 Miss. 504, 949 So. 458 (1922).
[83] *Brent* v. *Brister*, *supra*.
[84] MISSISSIPPI CODE ANNOTATED, 1930, § 435.
[85] See *Hanon* v. *Well*, 69 Miss. 476, 13 So. 878 (1891) for old rule which was changed by *Person* v. *Kendrick*, 74 Miss. 235, 21 So. 37 (1896).
[86] MISSISSIPPI CODE ANNOTATED, 1930, § 436.
[87] *Ibid.*, § 437.
[88] *Ibid.*, § 438.
[88a] *Ibid.*, § 439.
[89] *Ibid.*, § 440.

oath or other means."[90] In a leading Mississippi decision, Cook, J., had the following to say on the issuance of an injunction:

> "Where complainant in bill seeking to set aside alleged fraudulent conveyance specifically charged that certain defendants receiving checks indorsed it fraudulently to bank to collect for them, . . . complainant was entitled to injunction restraining bank on which check was drawn from paying funds to payee by reason of such fraudulent indorsement."[91]

Preferable to an injunction is the writ of sequestration, which the courts have found to be more adequate than the issuing of an injunction. Of this writ the CODE provides that, "When a bill is filed in the chancery court in reference to personal property, and affidavit and bond as required thereof is made and filed, the clerk of the court shall issue a writ of sequestration."[92] From § 412 of the CODE OF 1930 we learn that the writ shall direct the sheriff to seize the particular property in question, and to hold same till further orders from the chancellor, or until the defendant from whose possession the same was taken shall give bond with sufficient sureties, payable to complainant in double the value of the property, and that it shall be conditional on having the property forthcoming to abide the decree of the court.

And,

> "If a forthcoming bond be given it shall be returned with the writ and filed in the cause, and in case the property shall not be delivered or forthcoming to abide the decree, shall have the force and effect of a judgment; and execution may issue thereon against all the obligors for the amount of the decree or the value of the property, according to the nature of the case. If a bond in double the debt is given, it shall be returned and filed with the papers in the cause. A bond in double the value of the property shall always be required, except when its value shall greatly exceed the debt and all probable cost."[93]

In conclusion, the holdings of the Federal courts with regard to the validity of this statute against fraudulent conveyances will be briefly considered. As a general rule it can be said, that in "federal courts the construction placed upon the statute by the highest courts of the state are considered controlling."[94] But this general rule does not apply to all statutes; especially this Mississippi statute against fraudulent conveyances, which the Federal courts in this state refuse to follow. Quite to the contrary, the Federal courts have held that simple contract creditors having no judgment at law have no standing in that court to set aside fraudulent conveyances. But instead, some lien or interest in the property must exist before the party will be

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[90] *Ibid.*, § 440.
[91] *Mississippi Valley Trust Co.* v. *Brewer*, 151 Miss. 177, 117 So. 540 (1928).
[92] MISSISSIPPI CODE ANNOTATED, 1930, § 408.
[93] *Ibid.*, § 412.
[94] 20 CYC. 344, c. 2.

permitted to bring his suit on the equity side of the federal court. The United States Supreme Court, in the case of *Scott* v. *Neely*,[95] said:

> "The right, in federal courts, of a trial by jury secured by the constitution cannot be impaired by blending with a claim cognizable at law a demand for equitable relief. . . . The Mississippi statute gives to the simple contract creditor a right to seek in equity, in advance of a judgment at law on his contract, the removal of obstacles to the recovery of his claim caused by a fraudulent conveyance of property. The whole suit . . . is treated as one in equity to be decided at a trial without a jury."

In short, the court in this case said that the complainant must be something more than a mere creditor; he must be a creditor with some sort of a property right in or lien upon the property he seeks to secure by his bill, because the foundation of jurisdiction in equity is an equitable right in the specific property sought to be attached because of an alleged fraudulent conveyance. On the other hand, in Mississippi, this common law principle that an equitable right must first exist in the complainant has been ignored by the framers of our statute. The further objection on the part of Federal courts, that the party was deprived of a jury trial does not apply to the state courts, as chancery courts in Mississippi may grant to the adverse party a jury trial whenever he makes a timely appeal to the court, and the judge in his discretion thinks that specific justice can be best obtained by a jury.[96]

Mississippi has undoubtedly made progressive strides, both in fields of legislation and judicial decision, as regards measures to prevent fraudulent conveyances of property by unscrupulous debtors. Not all avenues of escape in possession of the defrauding debtor have yet been closed, but since the passage of the first statute in 1882, remarkable advances have been made in this direction. It is now within the province of the more enlightened judges and legislators to almost entirely eradicate this public enemy.

EARL VANDORN CATOE, JR.

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[95] 140 U. S. 106, 11 Sup. Ct. 712, 35 L. ed. 358 (1892); a later case on this same point is *Cates* v. *Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 37 L. ed. 804 (1892).

[96] A leading case on this point is *McBride* v. *Adams, supra.*

RECENT IMPORTANT DECISIONS

AGENCY—INDEPENDENT CONTRACTOR—THE RELATIONSHIP AS DISTINGUISHED FROM THAT OF MASTER AND SERVANT.

Action to recover for person injuries received as a result of the negligent operation of a truck driven by one Gray, a public hauler, who was hauling logs for the defendant under a verbal contract by the terms of which Gray was to furnish his own truck, hire his own helpers, haul when it suited him, and receive an agreed sum for each thousand feet hauled. Defendant could discharge Gray at any day or hour, and had the right to direct him where to go to get logs and where to unload them. HELD: Gray was an independent contractor and defendant was not liable for his negligence, two judges dissenting. *McDonald* v. *Hall-Neely Lumber Co.*, 165 Miss. 143, 147 So. 315 (1933).

The courts of practically every state in the Union have defined the term "independent contractor" with such wide variance in the result that it would seem impossible to arrive at a definition which would apply in all cases. After reviewing carefully all these definitions the following is laid down in an annotation in 19 A. L. R.[1] and is amply supported by the authorities: "An independent contractor is a person employed to perform work on the terms that he is to be free from the control of the employer as respects the manner in which the details of the work are to be executed." The Mississippi Supreme Court defined the term in the case of *Callahan* v. *Rayburn*[2] in the following language: "An independent contractor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished."

The court has further laid down certain tests for use in determining whether the relationship is that of master and servant or of independent contractor: (1) The right of selecting the servant, (2) The right to discharge the servant, (3) The right to control.[3] These tests, while not stated in exactly the same terms, conform very closely to those followed in a majority of the jurisdictions. There seems to be no conflict as to the right of control on the part of the employer being the most important and determining test, but the results reached in its application are most contradictory. Just what constitutes control is a question of fact to be determined from the terms of the employment in each case.

In the case of *Kisner* v. *Jackson*[4] the court said that the main element required to constitute the relationship of master and servant is that the servant be subject to the control of the master in carrying on the business, and suggested these tests for determining whether or not that control existed: whether the master has the power to terminate the contract at will, whether he has the power to

[1] 19 A. L. R. 235.
[2] 110 Miss. 108, 69 So. 669 (1915).
[3] *New Orleans B. R. V. & M. R. R. Co.* v. *Norwood,* 62 Miss. 565 (1885).
[4] 159 Miss. 424, 132 So. 90 (1930).

fix the price in payment for the work or vitally controls the manner and time of payment, whether he furnishes the means and appliances for the work, whether he has control of the premises, whether he furnishes the materials upon which the work is done and receives the output thereof, whether he has the right to direct the details of the manner in which the work is to be done, whether he has the right to employ and discharge the subemployees and fix their compensation, and whether he is obliged to pay the wages of said employees. These tests conform very closely to those suggested in the American Law Institute's RESTATEMENT OF AGENCY[5] and are so exhaustive as to be determinative of almost any case which involves the question as to the nature of the relationship existing under a contract of employment.

The courts almost universally hold that it is not necessary that the power of control be exercised but merely that the right to such control be present.[6] Nor is it necessary that all the facts suggested by the tests menioned above be present in order to determine the relationship; cases are often decided on two or three or even one of these elements.[7]

An application of these tests to the facts in the case under discussion will tend to substantiate the holding of the court, for it appears that the defendant had no control over the methods which Gray used in carrying out the terms of the contract. However, defendant did have the power to discharge him at will and in some jurisdictions this fact has been sufficient to make the relationship that of master and servant. In the case of *Industrial Commission* v. *Bonfils*[8] the mere right to discharge at will without liability was held to constitute sufficient control to make the employee a servant even though the employer exercised no control over the work, and the truckman might employ substitutes, choose hours of work, and determine whether he would work or not. Another case holds that the power of an employer to terminate the employment at any time is incompatible with the full control of the work that is usually enjoyed by an independent contractor.[9] These decisions are based on the theory that the power to discharge gives the potential power of control. The Mississippi Court has not chosen to go this far and has held that the potential power of control given in the right to terminate the employment at will is not conclusive, but must be considered in connection with the other facts surrounding the employment.[10]

In reaching the decision that Gray was an independent contractor the court

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[5] RESTATEMENT, AGENCY, Section 220. This section, in determining whether or not a relationship is that of master and servant or independent contractor, considers the matters of fact mentioned in the case of *Kisner* v. *Jackson* (*supra,* note 4) and in addition suggests the following: whether or not the one employed is engaged in a distinct occupation or business; the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; the skill required in the particular occupation; length of time for which the person is employed; whether or not the work is a part of the regular business of the employer; and whether the parties believe they are creating the relationship of master and servant.

[6] *Ballard & Co.* v. *Lee,* 131 Ky. 412, 115 S. W. 732 (1907); *Tuttle* v. *Embury-Martin Lumber Co.,* 192 Mich. 385, 158 N. W. 875 (1918).

[7] As an example, see *Southern Express Co.* v. *Brown,* 67 Miss. 260, 8 So. 425 (1889).

[8] 78 Colo. 306, 241 Pac. 735 (1925).

[9] *Bowen* v. *Gradison Construction Co.,* 236 Ky. 270, 32 S. W. (2d) 1014 (1930).

[10] *Kisner* v. *Jackson, supra,* note 4.

has cited a number of Mississippi cases,[11] all of which seem to conform with and be based on the rules and tests already discussed. The holding in the present case is clearly in line with these decisions; and the law in Mississippi as to what constitutes the relationship of independent contractor would be fairly well settled and defined were it not for the case of *Hinton & Walker* v. *Pearson*.[12] In that case the plaintiff was employed in hauling lumber from the mill of the defendant to the railroad under a contract, the terms of which were very similar to those in the contract of employment in the case under discussion; but there the court held the truckman to be a servant rather than an independent contractor. This holding is clearly opposed to the one in the present case, and the failure of the court to overrule it is the basis for the dissenting opinion.

In *Hinton & Walker* v. *Pearson* the action was brought to enforce a lien given under section 2240 of the CODE OF 1930, and the court attempts to distinguish it from the instant case on the ground that if the question were presented the statute might be held to apply also to independent contractors. The statute gives all laborers and employees of sawmills a lien for their wages and to give it the construction here suggested by the dictum in the instant case would be to stretch its meaning beyond the limits set by its terms. Just what the legislature meant by the term "employee" as used in the statute is as yet a matter of conjecture, for from a study of the decisions it does not appear that the Mississippi Court has ever defined the term "employee." However, a study of the decisions of other jurisdictions shows that the term is usually used in a rather narrow, technical sense.[13] And if the term is given this narrow meaning, it appears that the statute here sought to be enforced is not susceptible of so broad a construction as that which the court indicates might be made. The legislature may have intended to give a lien to all whose labor aided in the manufacture and sale of the products of sawmills as is done by section 2238, CODE OF 1930, in the case of agricultural products; but it did not use language sufficient to convey that intention.

The fear that the decision of the case under discussion will make cotton pickers independent contractors as expressed by the dissenting opinion in a quotation from the case of *Harper* v. *Wilson*[14] appears groundless, for the custom of the community as to the control ordinarily exercised in this particular occupation is of importance; and in the case of an ordinary cotton picker the courts would undoubtedly hold that the facts surrounding the employment coupled with the right to discharge at will resting in the employer are sufficient to make the relationship that of master and servant.

GUY MITCHELL, JR.

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[11] *Crescent Baking Co.* v. *Denton,* 147 Miss. 639, 112 So. 21 (1927); *Hutchinson-Moore Lumber Co.* v. *Pittman,* 154 Miss. 1, 122 So. 191 (1929); *Werner Sawmill Co.* v. *Northcutt,* 161 Miss. 441, 134 So. 156 (1931).

[12] 142 Miss. 50, 107 So. 275 (1926).

[13] To be an employee, the relation of master and servant must exist. *Security Union Ins. Co.* v. *McLeod* (Tex.) 36 S. W. (2d) 449 (1931). To be an employee as distinguished from an independent contractor the employment must be under contract "of service" and not merely a contract "for service." *Mallinger* v. *Webster City Oil Co. et al.,* (Iowa) 234 N. W. 254 (1931).

[14] 163 Miss. 199, 140 So. 693 (1932).

ALIMONY—EFFECT OF REMARRIAGE OF WIFE—POWER OF COURT TO MODIFY ACCRUED ALIMONY.

Plaintiff obtained a divorce from defendant in March, 1914, and alimony in the sum of $20 per month. Plaintiff remarried in June, 1914, and no steps were taken to collect the alimony until 1932, when she filed contempt proceedings against defendant. Defendant then filed his petition for modification of the alimony decree upon the grounds of plaintiff's subsequent marriage. The trial court awarded plaintiff $2,037 as alimony for the past seven years just immediately prior to August, 1932, holding that the statute of limitation barred all except that awarded. Defendant appealed. HELD: After her remarriage, plaintiff was not entitled to the alimony awarded her. *Sides* v. *Pittman,* ——Miss. ——, 150 So. 211 (1932).

It can not be ascertained from the opinion on what theory the court arrived at its conclusion. The reasoning is indefinite and uncertain.[1] There appear, however, to be only two possible theories known to our present day law under which it could reach this conclusion when faced with these facts:

1. That the subsequent marriage of the wife *ipso facto* terminated the alimony judgment and automatically relieved the former husband of his duty to comply further with the orders of the court; or

2. That the decree in this case modified the decree granting alimony, and that this modification was retroactive in its effect, relating back to the date of the second marriage.

Comment on this case will therefore be confined to these two theories of law. The first of these theories is in all probability the one adopted by the court as it seems more consistent with the reasoning used; it would require a strained construction of the opinion to hold that remarriage did not *ipso facto* terminate the alimony.

The law is universal and the authorities too numerous to cite to the effect that upon the subsequent marriage of a wife who is receiving alimony there is a different status created. The law is also well settled that this change of circumstances gives the former husband grounds to come into court and file a petition for a modification of the alimony decree.[2] The state of New York has a statute making it mandatory on the court to modify the alimony decree in a case of this kind.[3] In some of the states there are statutes retaining the jurisdiction of the court on the questions of alimony and support of the wife and children as the changing circumstances and conditions require from time to time.[4] In other states not having a similar statute the jurisdiction is usually

[1] Some of the cases cited in the opinion are not in harmony with the conclusion reached by the court. *Bowman* v. *Worthington,* 24 Ark. 522, is entirely in point and sustains the conclusion in the instant case, but the rule was later changed in the case of *Casteel* v. *Casteel,* 38 Ark. 477, by the same court. *Stillman* v. *Stillman,* 99 Ill. 196, 39 Am. Rep. 26, is not in point with the case under consideration in facts or conclusion. *Morgan* v. *Lowman,* 80 Ill. App. 558, seems to be in line with the instant case. *Carlton* v. *Carlton* appears to be in point, but has very little reasoning, and the basis for its conclusion is uncertain.

[2] *Stillman* v. *Stillman, supra; Nelson* v. *Nelson,* 282 Mo. 412, 221 S. W. 1066 (1920). Most of the other authorities cited herein support this statement, also.

[3] LAWS OF NEW YORK, 1904, p. 885, amending § 1771 CODE CIV. PROC., 1904.

[4] ANNOTATED CODE OF MISS., 1930, § 1421; CALIFORNIA CODE OF CIV. PROC., § 685, CIV. CODE § 138, 139; REVISED STATUTES OF MO., 1909, § 2375; COMPILED LAW OF UTAH, 1917, § 3000. The foregoing is merely a representative list, there being numerous others.

retained in the alimony decree. Therefore, in a great majority of the cases it is within the sound discretion of the trial judge whether he modify the alimony decree upon a subsequent marriage of the wife or not,[5] but there are few things which present better reasons for a modification than the subsequent marriage of the wife.[6] If the law were such that it would not give the former husband a right to come into court and petition for a modification of the alimony decree, thereby requiring him to continue to pay alimony to his former wife and a new husband, it would be a grave injustice under most circumstances. In some of the states it is considered against public policy for a wife to live with one husband and receive alimony from another,[7] and these courts therefore hold that she has abandoned the provision that the court made for her, and has embarked upon another weird and uncertain voyage. The same courts usually hold that the wife's right to alimony ceases upon her subsequent marriage; and from the conclusions reached in these cases it is evident that they are speaking of a legal right.[8] This is by far a minority view, however. Other jurisdictions hold that her right to alimony ceases upon her subsequent marriage, but require the husband to ask for a modification by way of petition; it is evident in these cases, however, that these courts are talking about a moral right.[9] Regardless of the above cases, the vast weight of authority supports the theory that the marriage itself does not *ipso facto* terminate the alimony, but that a court order is deemed necessary for this purpose.[10] Justice between the parties might have been worked out in the instant case; but new law has been written in Mississippi and the minority view in the United States has been followed if the court placed its opinion on the above theory. If this theory was not followed, it necessarily follows that the opinion must be based upon the second theory mentioned above.

2. Alimony is the provision that the court makes for the support of the wife and the minor children, if there be any. It places a legal obligation on the husband to comply with the order of the court that contempt proceedings may be used to enforce. The amount of the allowance is within the sound discretion

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[5] *Stillman* v. *Stillman, supra; Atlass* v. *Atlass,* (Cal.) 297 Pac. 53 (1931); *Nelson* v. *Nelson, supra; Sullivan* v. *Sullivan,* 215 Ala. 627, 111 So. 911 (1927); *Brandt* v. *Brandt,* 40 Or. 477, 67 Pac. 508 (1902); *Cohen* v. *Cohen,* 150 Cal. 99, 88 Pac. 267 (1906); *Morgan* v. *Morgan,* 211 Ala. 7, 99 So. 185 (1924).

[6] *Stillman* v. *Stillman, supra; Dietrick* v. *Dietrick,* 99 N. J. Eq. 711, 134 Atl. 338 (1926); *Southworth* v. *Southworth,* 168 Mass. 511, 47 N. E. 93 (1897); *Olney* v. *Watts,* 43 Ohio, 499, 3 N. E. 354 (1885); *McGill* v. *McGill,* 101 Kan. 324, 166 Pac. 501 (1917).

[7] *Stillman* v. *Stillman, supra; Atlass* v. *Atlass, supra; Hartigan* v. *Hartigan,* 145 Minn. 27, 176 N. W. 180 (1920); *Nelson* v. *Nelson, supra.*

[8] *Holmes* v. *Holmes,* 90 Minn. 466, 97 N. W. 147 (1903); *Haskell* v. *Haskell,* 116 Minn. 10, 132 N. W. 1129 (1911); *Hopkins* v. *Hopkins,* 40 Wis. 462 (1877); *Thomas* v. *Thomas,* 41 Wis. 232 (1876).

[9] *Nelson* v. *Nelson, supra.*

[10] "The second marriage of a divorced wife does not *ipso facto* terminate the alimony." *Warren* v. *Warren,* 92 N. J. Eq. 245, 112 Atl. 729 (1921). "The remarriage of the wife does not automatically terminate her alimony, but is ground for the husband's application to have it terminated or modified." MADDEN, DOMESTIC RELATIONS, § 97-98, p. 329 (1931). *Stillman* v. *Stillman, supra; Herman* v. *Brennon, supra; Atlass* v. *Atlass, supra; Brandt* v. *Brandt, supra; McGill* v. *McGill, supra; Nelson* v. *Nelson, supra; Chopsey* v. *Chopsey,* 10 N. J. Eq. 187, 144 Atl. 621 (1929); *Myers* v. *Myers,* 62 Utah, 90, 218 Pac. 123 (1923); *Britton* v. *Chamberlain,* 234 Ill. 246, 84 N. 7. 895 (1908); 19 C. J. 275, § 626 (3); 1 R. C. L. 950 § 96; annotations: 11 Ann. Cas. 523 (1909), 42 A. L. R. 602 (1925), 64 A. L. R. 1273 (1929).

of the trial judge. The allowance may either be in a lump sum or payable in installments.[11] Some courts hold that a judgment for alimony is a debt as any other money judgment;[12] others, that it is not a debt, but is in the nature of one.[13] By the great weight of authority, an accrued installment of alimony, or lump sum alimony that is due, is property with a vested right in the beneficiary.[14] By practically the unanimous weight of authority a judgment for accrued alimony will be given full faith and credit in any state under the full faith and credit clause of the Federal Constitution.[15] The Supreme Court of the United States held in *Wetmore* v. *Markoe*,[16] that an alimony judgment was not such a debt that would be discharged in bankruptcy, but placed its reasoning on the theory that the husband was under a legal and moral duty to support his wife and minor children. It is held in a great many states, however, that accrued installments of alimony may be collected by the personal representatives of the deceased wife from the husband.[17] It is likewise held that accrued installments of alimony may be collected by the wife out of the estate of her deceased husband.[18]

It therefore follows that by a vast weight of authority the wife has such a vested right in accrued installments of alimony that the courts can not deprive her of it.[19] This rule of law works no injustice on the husband, for it permits him to appear in court by way of a petition and ask the court to modify the

[11] *Nelson* v. *Nelson, supra; Cohen* v. *Cohen, supra.*

[12] "Installments of alimony actually accrued will support action at law and are final." *Simonton* v. *Simonton,* 33 Ida. 255, 193 Pac. 386 (1920). "Alimony decreed to a wife in a divorce is as much a debt, until the decree is recalled or modified, as any judgment for money is." *Stanfield* v. *Stanfield,* 67 Okla. 56, 168 Pac. 912 (1917); *Cormana* v. *Naron,* 37 Ind. 482, 217 Pac. 597 (1923); *Garrien's Adm'r.* v. *Michie et al.,* 122 Ky. 250, 91 S. W. 252 (1908).

[13] *Wetmore* v. *Markoe,* 196 U. S. 68, 25 Sup. Ct. 172, 49 L. ed. 390 (1904).

[14] "In the case at bar it was error to set aside the amount of alimony due. . . . the amount of such alimony was a debt due from defendant to beneficiary in the decree, and the latter had a vested property right therein, which the court was not authorized to take away from her." *Craig* v. *Craig,* (Ill.) 45 N. E. 153 (1896). "The power of the court to modify a decree as to the installments of alimony past due and unpaid does not exist. The right of the parties with reference to such installments became absolute and fixed at the time provided in the decree for their payment, and as to such time the decree is not subject to modification." *Kinnie* v. *Kinnie,* 137 Wash. 284, 242 Pac. 388 (1926). *Sistaire* v. *Sistaire,* 218 U. S. 1, 30 S. Ct. 682, 54 L. ed. 905 (1909); *Simonton* v. *Simonton, supra; Parker* v. *Parker,* (Cal.) 266 Pac. 283 (1928); *Phillips* v. *Phillips,* (Wash.) 6 Pac. (2d) 61 (1931); *Roach* v. *Roach,* (Ia.) 244 N. W. 899 (1932); *McGregory* v. *McGregory,* (Cal.) 122 Pac. 390 (1912); *Helkerkia* v. *Sanzinski,* 223 Ill. App. 30; *Jones* v. *Jones,* 216 Ky. 810, 288 S. W. 737 (1926); *Nelson* v. *Nelson, supra; Beers* v. *Beers,* 74 Wash. 458, 133 Pac. 605 (1913).

[15] *Wetmore* v. *Markoe, supra; Sistare* v. *Sistare, supra; Caples* v. *Caples,* (Cal.) 47 Fed. (2d) 225 (1931); *Simpson* v. *Simpson,* (Idaho) 4 P. (2d) 345 (1931); *McGregory* v. *McGregory, supra; Carmona* v. *Noron,* 37 Idaho 482, 217 P. 597 (1923); *Simonton* v. *Simonton, supra.*

[16] *Supra,* note 13.

[17] *Miller* v. *Clark,* 23 Ind. 370 (1864); *Gerrien's Adm'r* v. *Michie et al., supra; Dinet* v. *Eigenmonn,* 80 Ill. 274 (1875); *O'Hagen* v. *O'Hagen's Ex'r.,* 4 Cole (Iowa) 509 (1857); *Stillman* v. *Stillman, supra.*

[18] *Craig* v. *Craig, supra; Knopp* v. *Knopp,* 134 Mass. 353 (1882); 19 C. J. 278, § 633; 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS, (6th ed.), § 1853, p. 1995 (1896); annotation, 2 L. R. A. (N. S.) 242 (1905).

[19] "A judgment for alimony is not subject to modification as to a sum already accrued and past due." *Cummings* v. *Cummings,* 97 Cal. App. 144, 275 Pac. 245 (1929). "The superior court has no power under guise of modification to expunge the amount of accrued allowance at the time of commitment." *Ex parte*

alimony decree as soon as his former wife marries; but if he is guilty of laches he can not be heard to ask a court of equity to extract him from a situation caused by his own negligence. If the court in the case under discussion was basing its decision on the last theory mentioned, it is going against the great weight of authority over the United States, and is in a measure repudiating its own former opinion.[20]

It therefore follows that the Mississippi Court in the instant case aligned itself with a very small minoriay view in the United States.

GEORGE J. THORNTON

EQUITY—RELIEF AGAINST PENALTY—DISTINCTION BETWEEN PENALTY AND LIQUIDATED DAMAGES.

Plaintiff contracted with defendant to lease certain property from the latter at $6000 per year, the lease to extend for 99 years from date of execution. A deposit of $10,000 was made by defendant lessee, to insure prompt payment of rents among other stipulations set forth in the instrument. The contract stated that this amount was liquidated damages. Lessee defaulted in payments after five years, and lessor took possession of the property. Lessee sues here for the return of the $10,000 deposit. HELD: The re-entry of the lessor on the property terminated the lease, and lessee was liable for no additional rent payments which the deposit was to cover; the sum constituted a penalty, and the lessee was entitled to the return of the money. *Chicago Investment Company of Mississippi* v. *Hardtner,* —— Miss. ——, 148 So. 214 (1933).

Though the above decision may perhaps appear to be unjustified by the facts of the case if the provisions of the contract are considered in a strict and literal sense, yet the opinion of the Mississippi Supreme Court put the state judiciary directly in line with the majority holding of Amercan Courts on the question of liquidated damages.[1]

Asadoorian, 48 R. I. 50, 135 Atl. 322 (1926). *Simpson* v. *Simpson, supra; Phillips* v. *Phillips, supra; Going* v. *Going,* 144 Tenn. 303, 232 S. W. 443 (1921); *Kinnie* v. *Kinnie, supra; Beers* v. *Beers, supra; Jones* v. *Jones, supra; Harvey* v. *Harvey,* 45 R. I. 383, 123 Atl. 82 (1924); *Parker* v. *Parker, supra; Caples* v. *Caples,* 47 Fed. (2d) 225 (1931); *Meyers* v. *Meyers,* (Mo.) 22 S. W. (2d) 853 (1929); *Soule* v. *Soule,* 4 Cal. App. 97, 87 Pac. 205 (1906); *Rinkenberger* v. *Rinkenberger,* (Cal.) 277 Pac. 1096 (1929); *Roach* v. *Roach, supra; McGregory* v. *McGregory, supra; Stillman* v. *Stillman, supra; Cormona* v. *Noron, supra; Simonton* v. *Simonton, supra; Nelson* v. *Nelson, supra; Craig* v. *Craig, supra; Myers* v. *Myers,* 62 Utah, 90, 218 Pac. 123 (1923); *Krouss* v. *Krouss,* 11 N. Y. Supp. 788 (1908); 2 SCHOULER, *op. cit.,* § 1830, p. 1993; annotations: Ann. Cas. 1914A, 302, 30 A. L. R. 74 (1923).

[20] In 1911, the Mississippi Court spoke thus: "When this suit was brought, the right of the wife to the alimony had accrued. It was overdue and unpaid. . . . Appellant contends that the court is without authority, under the last clause of Section 1673, Code of Mississippi, [§ 1421 of CODE OF 1930] at a subsequent term to alter or change this decree. Our judgment is this contention is sound, and is supported by the authorities." *Guess* v. *Smith,* 100 Miss. 457, 56 So. 166. The case involved a question of lump-sum alimony payable at once; but the authorities make no distinction between accrued installments of alimony and accrued lump-sum alimony.

[1] *Virginia Amusement Company* v. *Mid-City Trust and Savings Bank,* 220 Ill. App. 147; *Steel* v. *Thompson,* 59 Cal. App. 191, 210 Pac. 430 (1922); *Wilson* v. *Agnew,* 25 Col. App. 109, 136 Pac. 36 (1913); *Adams* v. *Dunn,* 64 Pa. Super. Ct. 303; *Sutton* v. *Goodman,* 194 Mass. 389, 80 N. E. 60 (1907).

The question of whether or not a sum of money placed in the hands of a lessor to insure the performance of certain stipulations on the part of the lessee set forth in the contract constitutes a penalty or liquidated damages has been subject to much discussion on the part of the American judiciary for a number of years. To lay down a definite criterion so as to definitely enable the court to determine under which of the two classes the amount deposited in a certain contract should come, has been pronounced impossible by four different courts.[2] However, three factors—(1) the intent of the parties, (2) the reasonableness of the liquidation, and (3) the language employed— are recognized as elements in a contract that can determine under which of the two, penalty or liquidated damages, a particular contract will be classed.[3]

It has been stated that "uncertainty as to the extent of the injuries which ensue is always a criterion by which to determine whether the case is one of liquidated damages or a penality."[4] However, many courts, including that of Mississippi,[5] have held that whether a particular sum stipulated is a penalty or liquidated damages is a question of construction to be decided from the terms and inherent circumstances of the particular contract judged as of the time of its execution and not as of the time of its breach.[6]

Basing their contention on the equitable maxim that "Equity looks to the intent rather than to the form of a transaction," the courts have gone so far as to hold that even though a contract specifically states as a part of the instrument that the money placed in the hands of the lessor by the lessee constitutes liquidated damages and was to become the property of the lessor on failure of the lessee to comply with certain stipulated terms of the instrument, the deposit could be treated as a penalty if so judged by the court, in spite of the terms of the contract.[7] A result exactly the reverse of the above holding was reached in the case of *Alterbury* v. *Bank of Washington Heights of the City of New York,*[8] where the court interpreted and treated a deposit made with a lessor as liquidated damages, though the instrument executed by the two contracting parties specifically stated that the amount constituted a penalty in case of the failure of the lessee to meet certain requirements set forth in the contract.

Not only have courts refused to allow the lessor to retain the amount deposited with him by the lessee in case of breach of the contract on the grounds of a penalty, but another rule promulgated in at least two cases gives the lessee another and entirely different ground on which to stand in basing his claim for return of the deposit. In one of these cases,[9] the court held the election of the lessor to terminate the lease for non-payment of rent and the ejection of

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[2] *Elzy et al.* v. *Waterloo, C. F. & N. Ry. Co. et al.,* 193 Iowa, 330, 183 N. W. 378 (1921); *Seidlitz* v. *Auerback, et al.,* 74 N. Y. S. 82, 186 App. Div. 7 (1919); *McAlister* v. *Williams,* 77 Okla. 65, 186 Pac. 461 (1920); *Weiser River Fruit Ass'n* v. *Feltham,* 31 Idaho, 633, 175 Pac. 583 (1918).

[3] Eaton, Equity Jurisprudence, 2nd ed. § 32 (a), p. 90 (1923).

[4] Eaton, *op. cit.,* § 32 (e), p. 91.

[5] *Shields* v. *Early,* 132 Miss. 232, 95 So. 839 (1923).

[6] *Alvord* v. *Banfield,* 85 Ore. 49, 166 Pac. 549 (1917); *Shields* v. *Early,* 132 Miss. 232, 95 So. 839 (1923); *Wilson* v. *Mayor, etc. of Baltimore,* 83 Md. 203, 34 Atl. 774, 55 Am. St. Rep. 339 (1896); *Maybury* v. *Spinner-Mayburg Co.,* 122 Me. 422, 120 Atl. 611 (1923); *Ridley* v. *Sudbrick,* 172 N. Y. S. 517, 105 Misc. Rep. 52 (1918).

[7] *Central Trust Company* v. *Wolf,* 225 Mich. 8, 237 N. W. 29 (1931).

[8] 206 N. Y. S. 647 (1924).

[9] *Yuen Suey* v. *Fleshman,* 65 Ore. 606, 133 Pac. 803 (1913).

the lessee in an action, terminated the tenancy so as to release the lessee from liability for rent not due when he was ousted; and an amount deposited to insure observance of terms of contract was held to be a penalty, which equity would relieve against. The same principle is adopted in the other case[10] in one of the strongest opinions yet rendered on this point, the following language being used:

"A landlord by re-entering and assuming absolute control of the property because of a default by the lessee in paying rent or otherwise, or upon abandonment by the lessee, and acceptance by the lessor, thereby cancels the lease, so as to release both parties from subsequent liability under the lease, except damages accruing up to the cancellation, so that a landlord by re-entering upon the lessee's default in rent, and taking control of the property cancelled the lease so as to entitle the lessee to a deposit made to secure performance of the lease, when the deposit was intended as liquidated damages or a penalty; the landlord not being entitled to retake possession and at the same time resort to the deposit made to insure performance of the lease."

The fact that the decision is well grounded on authority and is in accord with the majority of the cases directly in point, is not to be denied; no criticism as to the result reached by the Mississippi Supreme Court can be offered from this standpoint. However, it is not too presumptive at this point to consider briefly the theoretical basis of this line of cases.

The tendency of the English as well as the American courts to give every available protection to the debtor is a long recognized policy and the adoption of rules that are harsh toward the creditor can be attributed in its origin to this viewpoint. Using the facts of the present case, for example, it is admitted that the lessee breached the contract and announced his inability to abide by the terms providing for the payment of the $1,500 every three months. He then was allowed to recover the amount deposited to "guarantee the prompt payment by the lessee to the lessor of the rent as hereinbefore stipulated" on two principles—one that if the amount deposited constitutes a penalty in the minds of the court it was unenforceable in a court of equity, and the other that the re-entry of the lessor on the land showed the intention of the lessor to terminate the contract, thus relieving the lessee of the contractual duty of paying a stipulated rental sum. The reasoning leading to the latter of these two principles seems to imply that the lessor had an election as to which of two courses he would follow—one to either leave the lessee in possession or, on desertion of the lessee, to leave the property vacant and apply the deposited sum as rent; and the other to go upon the property and automatically terminate the lease and relieve the lessee of the liability of having to meet the further rental payments.

The argument is advanced by the court that the lessor in the case could not have the possession of the property in question and the deposit both; but after making this statement, the court immediately proceeds to give the lessee the right to the deposit and at the same time does not hold him liable for any damage whatsoever, when he is admittedly guilty of a total breach of the contract. The question might be asked at this point if from the above conditions, it could be said that the lessee who was demanding equity at the hands of the court was doing equity himself by asking for the return of the deposit, without tendering anything whatsoever to cover the damages suffered by the lessor as the result of his (the lessee's) breach of the contract. Even assuming

[10] *Wilson* v. *Agnew*, 25 Col. App. 109, 136 Pac. 96 (1913).

that the lessor was able to rent the property to a third party for the same rental price received from the lessee in this action, he almost certainly suffered some expense other than the loss of the rental payments during the term of transferring the property to other lessees, and a refusal of the court to at least allow the lessor this amount appears to be rather harsh regardless of the adopted views of the courts concerning this point.

Though the power is admittedly given to the court to determine whether a deposit constitutes a penalty or liquidated damages, the determination that $10,000 constituted a penalty on a contract involving the passage of over half a million dollars from one contracting party to another is at least a question of opinion that would allow of argument toward a different conclusion.

FRED M. GLASS

PROCESS—WAIVER OF SERVICE BY INDORSEMENT ON DECLARATION DURING TERM TIME.

During the term of court the defendant's attorney made a notation on the plaintiff's declaration that he waived process and entered appearance, there being no attestation by the clerk of the court. HELD: A default judgment was not authorized. *Industrial Investment Company, Inc.* v. *Standard Life Insurance Company,* —— Miss. ——, 149 So. 883 (1933).

There are only two ways by which a court can acquire jurisdiction over the person of a defendant: (1) by the service of process upon him, or (2) by his voluntary appearance and submission.[1] Courts are all agreed that though the service of process has been defective, or totally lacking, the defendant may waive such defect or the issuance and service of process and enter his appearance voluntarily in the action. It has been repeatedly decided that a voluntary waiver of service of process is good, and, amounting to voluntary appearance, dispenses with legal service.[2] Further, when the entry of appearance has been made by a voluntary waiver it becomes conclusive if made part of the record.[3]

For convenience, voluntary appearances may be classified in three groups. The first of these is the appearance of the defendant in person before the court for the purpose of answering, demurring, pleading, or moving to quash the proceeding.[4] An appearance for any of these four purposes has generally been held sufficient to constitute a general appearance.[5]

The second of these classifications is that of voluntary appearance through an attorney authorized by the defendant to make such an appearance for him, without the actual presence of the defendant in court. The attorney may enter

[1] *Bowler* v. *Hutson,* 30 Grat. (Va.) 266, 32 Am. Rep. 673 (1878).

[2] *Frisby* v. *Harrison,* 30 Miss. 452 (1855).

[3] A statement on the "record that the parties interested . . . [were] in court and waived formal notice" is conclusive evidence of appearance. *Frisby* v. *Harrison, supra.*

[4] *Miller* v. *Ewing,* 8 S. & M. 421 (1847); *Kegg* v. *Welden,* 10 Ind. 550 (1858); *Moore* v. *Ferrell,* 1 Ga. 7 (1846).

[5] In Mississippi there is no special appearance and appearance for any purpose waives want of process. *Turner* v. *Williams,* 162 Miss. 258, 139 So. 606 (1932). Such provision is statutory (MISSISSIPPI CODE ANNOTATED, 1930, § 2999 and 3000); and the courts of the majority of other states and the federal courts hold that a special appearance may be entered for certain purposes without subjecting the defendant to the jurisdiction of the court and without constituting a waiver of process.

the appearance of the defendant in all instances that the defendant might if he were personally in court.[6]

The third group is that of cases in which the defendant, not having appeared in court personally nor by attorney, waives process and enters appearance by endorsing upon the summons, or upon the declaration, or upon a separate paper, that he waives process and enters appearance. It is in this class of cases that confusion is likely to arise, since there is some measure of difficulty in determining what writing is sufficient to constitute a valid waiver and entry of appearance.

In some jurisdictions it has been held that a stipulation waiving process and reciting entry of appearance when endorsed on the summons, or when endorsed on, or filed with, the complaint, declaration, or petition, is sufficient.[7] In other jurisdictions it has been held that appearance is not entered by waiving process and reciting appearance, either when it is endorsed on the summons or on the pleading.[8]

In Mississippi such endorsement upon the declaration or the summons has been held to be a sufficient waiver and entry of appearance, when made within a certain time, and where there is a sufficient proof of acknowledgment or of the signature of the endorsement.[9] The Mississippi courts have repeatedly ruled that there must be proof of acknowledgment or signature in such cases;[10] and have consistently held that such proof is supplied by an attestation by the clerk of the court, or on appeal by its appearing on the record.[11] Although the courts of Mississippi have apparently not rendered a decision on the question of what is necessary to constitute sufficient legal proof of acknowledgment or signature, there is no reason why the same proof that would satisfy the demands of proof of signature or acknowledgment in other instances would not be adequate in these cases.[12]

The question of how proof of acknowledgment may be made is not as diffi-

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[6] *Soloman* v. *Tupelo Compress Co.,* 70 Miss. 822, 12 So. 850 (1893).

[7] *Shaw* v. *National State Bank of Mt. Pleasants et al.,* 49 Iowa, 179 (1878); *Salina Nat. Bank* v. *Prescott et al.,* 60 Kan. 490, 57 P. 121 (1899). In these two cases the endorsement was upon a paper in the one instance and upon the back of the summons in the other, and was held sufficient to constitute an appearance. The fact that the defendant may be a non-resident of the state and not subject to valid service of process would not seem to affect a voluntary appearance entered by his filing with the record a specific statement, signed by him, waiving service and entering his appearance, where he executed the entry of appearance in the estate of his residence. *Epps* v. *Buckmaster,* 104 Ga. 698, 30 S. E. 959 (1898).

[8] *McCormack* v. *The First Nat. Bank of Greensburgh et al.,* 53 Ind. 466 (1876); *First National Bank of Hastings* v. *Rogers,* 12 Minn. 529 (Gil. 437) (1867).

[9] *Byrne* v. *Jeffries,* 38 Miss. 533 (1860); *Winston* v. *Miller,* 12 S. & M. 550 (1849).

[10] *Winston* v. *Miller, supra; Harvie* v. *Bostic,* 1 How. 106 (1834); *Bacon* v. *Bevan & Co.,* 44 Miss. 293 (1876). Some states apparently disregard the necessity for proof of the acknowledgment. For instance, in the cases of *Shaw* v. *National State Bank of Mt. Pleasants et al., supra,* and *Salina National Bank* v. *Prescott et al., supra,* the notations and endorsement were held sufficient, though the court said nothing in the decision with reference or the necessity for proof of signature.

[11] *Byrne* v. *Jeffries, supra.*

[12] The courts of Mississippi in their decisions on this question have generally stated that sufficient legal proof is all that is necessary, without stating what constitutes such legal proof. *Harvie* v. *Bostic, supra; Bozman* v. *Brower,* 6 How. 43 (1841); *Winston* v. *Miller, supra.*

cult of determination as is the question of the time at which the acknowledgment of service and waiver of process by endorsement should be made in order for it to be a valid waiver and entry of appearance for the immediate term of court. By statute in Mississippi it is provided that "service of process shall be made upon the defendant five days before the return-day, which is the first day of the term; and if executed within the five days before the return-day it shall be good to require the appearance of the party at the next term after that to which it is returnable. . . ."[13] When the waiver of process by writing or endorsement on the declaration or summons has been made within the five days provided by statute or during term time, is the waiver a good appearance for the immediate term of court or does it constitute an appearance for the succeeding term?

A review of the instant case, with two prior Mississippi decisions, may throw some light upon the question. In the case of *Hemphill* v. *Hemphill*[14] the notation entered upon the declaration acknowledging service of the summons and authorizing judgment at the present term of court was endorsed on the declaration during the term of court, without any attestation by the clerk of the court, in both of which respects it is similar to the instant case. In that case as in the instant one it was held that the court had not acquired jurisdiction of the defendant and could not render judgment against him. In the case of *Byrne* v. *Jeffries*,[15] in which the court expressly stated that it could be distinguished from the Hemphill case, the notation was entered on the declaration, filed, and attested by the clerk of the court six days before the beginning of the term of court; and it was held sufficient to authorize a judgment thereon. If the language used by the court in *Hemphill* v. *Hemphill* is construed literally, it would appear that the court intended to lay down the ruling that appearance could not be made by a notation or endorsement upon the declaration or summons, regardless of the time and manner of making. However, the court reached the right result; for in any event there was no proof given of the notation or the signature of the defendant, such a failure being fatal under the line of Mississippi decisions requiring such proof. *Byrne* v. *Jeffries* does not, in actuality, overrule the decision of the court in the Hemphill case, when it is considered from a standpoint merely of the result reached; but it does limit that decision to the facts of that case, and expressly states that the language of the latter case implying that the appearance of a defendant cannot be entered by a notation on the declaration, sufficiently proved, is not to be followed. The effect of the decision in *Byrne* v. *Jeffries* is that an appearance to an action can be made out of term time by entry of appearance on the complaint, in the proper office, and before the clerk of the court, and a valid judgment may be entered upon proof of such an appearance.[16]

From a consideration of these cases it is evident that upon sufficient proof an acknowledgment or waiver of process and entry of appearance filed before the beginning of the five days prior to the beginning of the court term is an appearance for that term of court. And from the statute quoted above and the implication that the instant case leaves such an endorsement with sufficient proof made after the beginning of the five-day period or during the term will apparently

[13] Mississippi Code Annotated, 1930, § 2968.
[14] *Hemphill* v. *Hemphill,* 34 Miss. 68 (1857).
[15] *Byrne* v. *Jeffries, supra,* note 9.
[16] See the decision of the court in the instant case to the same effect.

constitute an appearance for the term of court succeeding the one during which it is filed, but not for the immediate term. Such is the apparent meaning to be implied from the language of the cases, though the question has not been directly submitted to the court. Whatever the decision of the Mississippi court may be in the future, it would appear more reasonable, considering the fact that a voluntary appearance of the defendant in court during term time is a good appearance, and considering the fact that the endorsement upon the declaration amounts to more than a mere execution of service of process and constitutes an appearance upon sufficient proof, to hold that a waiver by endorsement upon the declaration or summons entering a voluntary appearance is, upon proof, an appearance for the present term of court.[17]

CHARLES S. TINDALL

TORTS—NEGLIGENCE—LIABILITY OF RAILROAD, HAVING ASSUMED CARE OF INJURED TRESPASSER, FOR FAILURE PROPERLY TO CARE FOR HIM.

Defendant railroad company, having picked up the plaintiff who was run over by a train, carried him to his destination. Here, the train crew was unable to find a railroad physician, and, ignoring plaintiff's request to be put off at this place, carried him to another town further on, doing nothing in the meantime to treat his injuries. Plaintiff's leg, because of absence of treatment during this time, had to be amputated. HELD: Defendant was liable for its negligence in failing to secure prompt treatment for plaintiff, when it had assumed charge of him, and for ignoring his request to be put off at his destination. *Yazoo & M. V. R. Co.* v. *Leflar,* —— Miss. ——, 150 So. 220.

The court considered the plaintiff as a trespasser, and based its decision upon the doctrine, laid down in an earlier case decided by the same court,[1] that where a railroad company assumes charge of a trespasser who has been injured by its train, it takes upon itself the duty of treating him with common humanity. This duty demanded that the railroad company obtain medical treatment for the plaintiff at the earliest reasonable time after the accident, and that the request of the plaintiff to be put off at his destination be granted. The defendant was held to be negligent in the discharge of each of those duties.

It was not necessary for the court to decide the question, in this case, as to whether the defendant was under a duty to stop the train and pick up the injured trespasser, since care of him was in fact undertaken. On this question there is a conflict of authority. It is held by one line of cases that the rule that one is not under a duty to care for a person injured without his fault applies even if the person sought to be charged was at the time of the injury in charge of the instrumentality which inflicted the injury.[2] There is also a line of decisions which holds that the person in charge of the instrumentality which inflicted the injury, no matter what was the cause of it, or who was responsible

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[17] This conclusion would seem to be supported by the decisions of the Kansas courts, in the case of *Salina Nat. Bank* v. *Prescott et al., supra,* the decision being based upon the Kansas statute which provided that "an acknowledgment on the back of the summons, or the voluntary appearance of a defendant is equivalent to service." CODE OF CIVIL PROCEDURE (Kansas), § 67. It was held in this case that a voluntary appearance is made by the defendant signing a paper, entitled in the cause, waiving service of summons and entering an appearance in the action, regardless of whether the same is filed with the petition or afterwards, in term time or in vacation.

[1] *Dyche* v. *Vicksburg, S. & P. R. Co.,* 79 Miss. 361, 30 So. 711 (1901).

[2] *Union Pac. R. Co.* v. *Cappier,* 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 513 (1903); *Griswold* v. *Boston & Me. R. Co,* 183 Mass. 434, 67 N. E. 354 (1904); *Riley* v. *Gulf, etc. R. Co.,* 160 S. W. 595 (Tex. Civ. App.) (1913); *Kendall* v. *S. & N. R. Co,* 25 Ky. Law, 793, 76 S W. 376 (1903).

for it, is under a duty to care for the injured person.[3] All that the Mississippi Supreme Court decides is that *if the railroad does assume such care,* it is then charged with the duty of common humanity to secure assistance for the injured person at the earliest moment after the injury which the circumstances will permit, even though the railroad was without fault in causing the injury.

While the rule followed by the Mississippi court is found to be supported by the weight of authority,[4] it has been criticized by several courts, the leading case opposing it being a Massachusetts decision.[5] This latter court expressly disapproves the Dyche case,[6] saying that it subjects the "good Samaritan to an action for not acting quickly and allows the Priest and Levite to go free." The Masachusetts court apparently disregards the common-law principle that one who voluntarily undertakes a task, even though under no obligation to do so in the first instance, is charged with the legal duty of performing that task with the care of an ordinarily prudent person. It would seem that the reasoning adopted by the Massachusetts court leads to a cold-blooded and inhumane rule of law. The social obligation which rests on all men is sufficient to impose on a railroad which undertakes to care for an injured trespasser, the duty of caring of him properly. And whether this duty is discharged should be determined by the jury.[7]

The rule followed by Mississippi does not work any hardship upon the carrier. The railroad owes no duty other than that of placing the injured person within a reasonable time in the care of one who is competent to treat him. It is not responsible for the subsequent negligence of that person toward the injured trespasser.[8]

It also seems, concerning the question as to the duty of the carrier to assume care of a trespasser injured by its train, that the better rule is that established by the leading case of *Northern R. Co.* v. *State.*[9] It would be a shock to one's sense of humane treatment if a railroad whose train had injured a person, even though without fault on its part, should be permitted to leave such person lying in an injured condition by the side of the track without offering any assistance whatever. There would be no need for the rule, that having taken upon itself to care for him it must use due care, if the railroad were under no obligation to assume such care.

While the rule has been stated in general terms regarding the duty of the person in control of the instrumentality which inflicts the injury to the injured, without fault in the person, the cases which support the rule are cases involving injuries inflicted by railroad companies. But if the person sought to be charged was in control of the instrumentality which inflicted the injury, though without his fault, he should be charged with the duty to care for the injured person, whether the instrumentality be a railroad train or some other agency. This principle would not, however, go so far as to change the owner of land with the duty of caring for an injured trespasser found on his land where such owner was not in control of the instrumentality which inflicted the injury.

James S. Eaton.

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[3] *Northern Cent. R. Co.* v. *State,* 29 Md. 420, 96 Am. Dec. 545 (1868); *Whitesides* v. *Sou. R. Co.,* 128 N. C. 229, 38 S. E. 878 (1901). See, also, annotation in 69 L. R. A. 533.

[4] *Slater* v. *I. C. R. Co.,* 209 F. 480 (1911); *Carey* v. *Davis,* 190 Iowa, 726, 180 N. W. 889, 12 A. L. R. 904 (1921); *Union Pac. R. Co.* v. *Cappier, supra; Dyche* v. *Vicksburg, S. & P. R. Co., supra.*

[5] *Griswold* v. *Boston & Me. R. Co., supra.*

[6] *Dyche* v. *Vicksburg, S. & P. R. Co., supra.*

[7] *Dyche* v. *Vicksburg, S. & P. R. Co., supra.*

[8] *New Orleans, etc., R. Co.* v. *Humphreys,* 107 Miss. 396, 65 So. 497 (1914).

[9] 29 Md. 420, 96 Am. Dec. 545 (1868); see also, 69 L. R. A., 533.